Petition

81-452

No. —

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In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Select Committee on Aging of the United States House of Representatives, through its chairman, duly authorized an in-depth investigation into alleged abuse in the sale of medicare supplementary health insurance policies, including cancer insurance. In accordance with investigatory methods developed by the Select Committee to ascertain firsthand information concerning sales practices, the investigatory staff obtained trainee positions with a cancer insurance agent, posed as potential purchasers and arranged a meeting at which the agent delivered his standard cancer insurance promotion. Unknown to the agent, the meeting was taped and portions of that tape subsequently broadcast by a national television network. The questions presented are:

1. Whether the acts performed by congressional staff in preparation for and subsequent to the meeting arranged to provide a technique for gathering information on abusive sales practices which were the subject of a committee investigation are legislative acts entitled to the protection of the Speech or Debate Clause where the meeting was taped and broadcast by a national television network.

2. Whether the Speech or Debate Clause provides protection from liability in a civil action for acts performed as part of "field work" by the investigative

staff of a committee of Congress in connection with an investigation into alleged abuses in cancer insurance sales to the elderly.

3. Whether there is an illegality exception to the Speech or Debate Clause protection for legislative acts upon the mere allegation of statutory or common law violations.[1]

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[1] Original parties before the United States Court of Appeals for the Fourth Circuit: (1) Mrs. Issac (Betty) Hamburger, special senior citizen investigator for the House Select Committee on Aging, a petitioner herein; (2) Mrs. Lillian Teitelbaum, a special senior citizen investigator for the Select Committee, a petitioner herein; (3) David Holton, Chief Investigator for the Select Committee, a petitioner herein; (4) Kathleen Gardner, professional staff member for the Select Committee, a petitioner herein: (5) George H. Benford, an independent insurance agent, Respondent herein. Defendants American Broadcasting Companies, Inc., a New York Corporation, and Margaret Osmer, an ABC employee, did not join in the appeal of the district court's speech or debate and official immunity rulings, and therefore, were not parties below.

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v.

GEORGE H. BENFORD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners herein,[2] four congressional staff members of the Select Committee on Aging of the United States House of Representatives, through the General Counsel to the Clerk of the United States House of Representatives, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 17, 1981 in this proceeding.

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[2] David Holton, Chief Investigator; Kathleen Gardner, Professional Staff Member; Mrs. Isaac (Betty) Hamburger, senior citizen investigator and Mrs. Lillian Teitelbaum, senior citizen investigator, Select Committee on Aging, U.S. House of Representatives.

OPINIONS BELOW

The opinion of the court of appeals is not reported. Appendix A, *infra* pp. 1a–4a. The first opinion of the district court, Appendix B, *infra* pp. 6a–30a is reported at 502 F. Supp. 1148. The opinion of the district court upon reconsideration is not yet reported. Appendix C, *infra* pp. 31a–37a.

JURISDICTION

The judgment of the court of appeals, Appendix A, *infra* p. 5a, was entered on June 17, 1981. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, Clause 1, of the Constitution provides in pertinent part

> . . . for any Speech or Debate in either House they [Senators and Representatives] shall not be questioned in any other Place.

Section 10–410 of the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. § 10–410 provides:

> "(a) Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications, and be entitled to recover from any person:

"(1) Actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1,000 whichever is higher;

"(2) punitive damages; and

"(3) a reasonable attorney's fee and other litigation costs reasonably incurred."

Section 2520 of Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2520, provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communication, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT OF THE CASE

The facts of this case are simple, undisputed and briefly referenced in the opinions of both the district

court, Appendix B, *infra* pp. 6a–8a, and the court of appeals. Appendix A, *infra* pp. 1a–2a.

The Select Committee on Aging of the United States House of Representatives, chaired by the Honorable Claude D. Pepper, which has jurisdiction over the study and review of the problems of older Americans, H.R. Rule X, cl. 6(g), *Rules of the House of Representatives*, § 702, *reprinted in, Constitution, Jefferson's Manual and Rules of the House of Representatives*, H.R. Doc. No. 96–398, 96th. Cong., 2d Sess. 391 (1981) conducted an extensive investigation into abuses in the sale of supplemental health insurance, including cancer insurance, to the elderly. Appendix B, *infra*, p. 7a.

The investigation was authorized by Chairman Pepper, who directed "the committee staff to conduct an in-depth investigation into alleged abuse in the sale of medicare supplementary health insurance policies." *Abuses In The Sale of Health Insurance To The Elderly In Supplementation of Medicare: A National Scandal, A Staff Study by the House Select Committee on Aging*, Committee Pub. No. 95–160, 95th Cong., 2d Sess. III (Committee Print 1978) (Preface by Chairman Pepper). The techniques utilized by the Select Committee staff to learn first-hand about allegedly abusive sales practices included obtaining positions as trainees, posing as potential purchasers and consummating sales of policies in some instances during pre-arranged meetings designed to provide an opportunity to evaluate insurance agents' sales practices.

Over fifty (50) such staged "sales meetings" like the one at issue here were conducted by the Select Committee. In at least one instance, a Member of the Select Committee, Representative Mario Biaggi, posed as a retiree to observe the sales practices employed by agents selling cancer insurance. *Cancer Insurance: Exploiting Fear For Profit (An Examination of Dread Disease Insurance)*. Comm. Pub. No. 96–202, House Select Committee on Aging, 96th Cong., 2d Sess. 54 (1980).

Finally, the information obtained and observations made during these meetings were communicated to the Select Committee during a hearing called to receive testimony and document the findings. *Abuses In The Sale of Cancer Insurance To The Elderly: Hearings Before the House Select Committee on Aging,* Comm. Pub. No. 95–165, 95th Cong., 2d Sess. 122–125 (1979) (statement of Kathleen Gardner, professional staff member).[3] Respondent "has not challenged the power of the House of Representatives to inquire into the subject matter of the investigation, the formation of the Select Committee for that purpose and the use of the [petitioners] as employees of the Select Committee to assist in the investigation and to gather data for the Select Committee." Plaintiff's Memorandum of Points and Authorities, and Affidavit, In Opposition to the Motion of Defendants to Dismiss or Alterna-

[3] Copies of these officially published congressional documents have been lodged with the Clerk for the convenience of the Court.

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tively For Summary Judgment, *Benford* v. *American Broadcasting Companies, Inc.*, Appeal No. 81–1200 (4th Cir.) [4]

As part of the Select Committee's investigation, one congressional staff member obtained employment as a trainee with Respondent's insurance agency and arranged a meeting at which Respondent "presented his standard cancer insurance promotion" Appendix B, *infra* p. 8a, to two elderly women, also employees of the Committee. Appendix A, *infra* p. 2a. Without Respondent's knowledge or consent, the November 3, meeting at the home of one of the congressional employees was taped by American Broadcasting Companies, Inc. (ABC). Portions of the meeting were broadcast on the ABC Nightly News. Appendix B, *infra* p. 8a. Following the broadcast Respondent learned that the persons involved in the meeting were part of the Select Committee's investigatory team and filed an action for money damages, asserting that petitioners violated the Maryland Wiretapping and Electronics Surveillance Act, Md. Cts. & Jud. Proc. Code Ann §§ 10–401, *et seq.*, the Fourth Amendment to the Constitution, the federal Wiretapping and Electronic Surveillance Statute, 18 U.S.C. § 2510 *et seq.*, and the common law torts of civil conspiracy, malicious interference with business relations, and invasion of privacy. Appendix D, *infra* pp. 38a–54a.

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[4] Plaintiff's memorandum is part of the record below, designated as "tab" number 044.

A. PROCEEDINGS IN THE DISTRICT COURT

The action, originally filed in Circuit Court for Baltimore County, was removed to federal court by all the defendants pursuant to 28 U.S.C. § 1441(a)–(c) (federal removal statute), and the doctrines of original and pendent jurisdiction.[5]

The Petitioners moved to dismiss the complaint or alternatively for summary judgment based on the Speech or Debate Clause, the doctrines of absolute official and qualified immunity and failure to state a claim for which relief could be granted. The district court denied the motion. Appendix B, *infra* pp. 29a–30a. The district court's decision was devoted *exclusively* to whether "the taping or the subsequent broadcasting is within the scope of absolute protection afforded by the Speech or Debate Clause." Appendix B, *infra* p. 13a. The Court employed a simple two part analysis in which it determined that neither the broadcast by ABC of the taped meeting of November 3, 1978, nor the taping of the meeting were protected by the Clause, but completely ignored the substantial allegations in the complaint charging legislative acts which do not constitute broadcasting or taping.

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[5] The complaint included a claim that the alleged conduct violated the Fourth Amendment to the Constitution. The district court determined that it set forth a separate and independent cause of action arising under the Constitution and that as a result the court had pendent jurisdiction over the other counts. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Appendix D, *infra*, pp. 44a–46a.

Upon motion by Defendant ABC the district court dismissed the Fourth Amendment claim as to ABC and defendant Osmer, an ABC employee, Appendix C, *infra* p. 32a, subsequent to which Petitioners renewed their motion to dismiss the Fourth Amendment claim as to them and moved for reconsideration of the earlier Speech or Debate rulings. The district court granted dismissal of the Fourth Amendment claim and denied reconsideration of its earlier ruling on the Speech or Debate Clause. Appendix C, *infra* pp. 33a–37a. The district court held that since "[i]t is fair to infer that the Congressional defendants knew that the meeting was to be taped and that what they claim to be legitimate investigative activity was done with an eye toward the sales meeting," no absolute immunity attached to the acts of the congressional investigatory staff in arranging the meeting. Appendix C, *infra* pp. 34a–35a. The district court further explicated its interpretation of the Clause by finding that the "many acts that the Congressional defendants claim must be separately considered were allegedly part of a scheme that culminated with the meeting of November 3, 1978. The Court's judgment is unchanged that the preparatory conduct must be considered in conjunction with the taped meeting." Appendix C, *infra* p. 35a. Petitioners filed a timely notice of appeal pursuant to 28 U.S.C. § 1291. *Helstoski* v. *Meanor*, 442 U.S. 500 (1979).

B. DECISION OF THE COURT OF APPEALS

In an unpublished opinion issued *per curiam* the court of appeals affirmed the district court decision.

The court of appeals simply adopted the reasons stated by the district court for denying the Speech or Debate Clause claims. Appendix A, *infra* p. 3a. The court of appeals failed to consider the applicability of the Speech of Debate Clause to the allegations in the complaint charging the performance of legislative acts, and addressed itself *solely* to the taping and later broadcast of the November 3, 1978 "sales meeting". The court held that public broadcast of the meeting could not, as a matter of law, be part of the deliberative and communicative process by which legislation is considered, Appendix A, *infra* p. 3a and then went on to state that summary judgment could be later obtained "if the congressional defendants factually demonstrate that their involvement in the taping was protected legislative activity." Appendix A, *infra* p. 3a.

Like the district court, the court of appeals did not address Petitioners' claim that a complaint portions of which charge the performance of legislative acts must be either dismissed or redacted to prevent extra-legislative questioning of legislative behavior.

The court of appeals paid lip-service to the Speech or Debate Clause immunity and this Court's interpretations by citing *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975) for the proposition that "liability may not be predicated on 'legislative acts' performed by the congressional defendants", Appendix A, *infra* p. 3a, but failed to give any vitality to this principle by allowing to stand, unchanged and in its entirety, a complaint which is replete with alle-

gations of legislative acts. The court of appeals failed to identify which, if any, of the alleged actions of congressional defendants it deemed to be "not legislative in nature."

In summary, as a result of the rulings below, in addition to the other issues reserved for further disposition, Petitioners must face trial or further judicial proceedings on legislative acts.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS ISSUES OF EXTRAORDINARY IMPORTANCE TO THE EFFECTIVE FUNCTIONING OF THE LEGISLATIVE INVESTIGATORY PROCESS

The ability of Congress to conduct investigations into subjects "on which legislation may be had" has far reaching implications for the viability and efficacy of the legislative function.

The inherent power of Congress to conduct investigations in aid of its legislative authority has been recognized by this Court many times. *McGrain* v. *Daugherty,* 273 U.S. 135 (1927), *Watkins* v. *United States,* 354 U.S. 178 (1954). Similarly, the Court has vindicated the prophylactic role of the Speech or Debate Clause to foreclose "questioning" in judicial proceedings based on the performance of those investigative functions either in terms of liability, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 502–503 (1975), or from being compelled to answer for legislative actions *Gravel* v. *United States,* 408 U.S. 606, 622 (1972), and has held that the Clause protects legislators and aides "not only from the consequences

of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967). This is so because the Clause serves the important public interest of insuring free and robust exercise of legislative functions without fear of reprisal through lawsuits by private litigants. *United States* v. *Brewster,* 408 U.S. 501, 548 (1972) (Brennan, J., dissenting opinion). The failure of either federal court below to provide relief from a complaint charging the performance of *concededly* legislative acts, either in preparation for the November 3, 1978 meeting or in reporting the results of the meeting to the Select Committee, strikes at the heart of the legislative investigatory function, and if allowed to stand, will have a serious effect on the efficacy of the Article I powers devolved upon Congress. Moreover, if the investigative methods utilized in gathering information by the Select Committee in obtaining trainee positions and arranging meetings between staff posing as potential purchasers and sales agents to learn firsthand about sales practices are determined to fall outside the legitimate legislative sphere, it will have broad impact on the ability of Congress to secure accurate information concerning "the conditions which the legislation is intended to affect or change," *McGrain, supra* at 175, and may seriously impair and restrict Congress' ability to respond, through remedial legislation, to perceived problems. Against this background, and the special considerations governing the Speech or Debate Clause, we turn to the additional reasons why certiorari should be granted.

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER

Respondent's complaint charges, *inter alia*, that one of Petitioners "falsely represented that she was vitally interested in becoming an Independent Agent of American Family *when in fact she was merely establishing herself to investigate the operation of Benford for the Select Committee. . .*" Amended Complaint ¶ 6(d), *George H. Benford* v. *American Broadcasting Companies, Inc., et al.* No. 81–1200 (4th Cir., June 17, 1981) (emphasis added), Appendix D *infra* pp. 47a–48a; that the meeting arranged by Petitioners at which Respondent presented his standard cancer insurance promotion was "an apparently *bona fide* meeting to study and avail [petitioners] Hamburger and Teitelbaum of Cancer Care insurance coverage, whereas, in fact, it was for an unlawful surveillance *to obtain information for the Select Committee*." Amended Complaint ¶ 6(h), *supra* (emphasis added), Appendix D, *infra* p. 48a, and that Petitioner "Gardner presented knowingly false and misleading statements before the Select Committee [at its hearing] on November 28, 1978." Appendix D, *infra* p. 49a. Petitioners submit that the lower courts' complete failure to provide for *any* relief from the charges in the complaint alleging performance of legislative acts, and the motives therefor, conflicts with the law of the District of Columbia Circuit, *McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1977) (en banc) *cert. dismissed as improvidently granted*, 438 U.S. 189 (1978), and with the law of the

Third Circuit. *United States* v. *Helstoski,* 635 F.2d 200 (3d Cir. 1980) *on remand from United States* v. *Helstoski,* 442 U.S. 477 (1979).

In *McSurely,* plaintiffs brought an action against the Chairman, General Counsel, and Chief Counsel and Investigator of the Senate Permanent Subcommittee on Investigation alleging that the defendants violated their constitutional and statutory rights in obtaining and using material seized from plaintiff's home by Kentucky law enforcement authorities to issue subpoenas and procure contempt of Congress citations for non-compliance therewith. The civil suit involved allegations that the Subcommittee's examination and use of these documents as the basis for the issuance of subpoenas and the procurement of contempt of Congress citations for non-compliance were unconstitutional. The Court of Appeals *en banc* reversed the district court's denial of a motion to dismiss with instructions to grant summary judgment "on those parts of the complaint that complain of the use made of the documents within Congress." 553 F.2d at 1280. In addition, the *McSurely* court further held that *"Servicemen's Fund* prevents further inquiry into plaintiff's charge that the Subcommittee's purpose was to harrass and intimidate them in the exercise of their First Amendment rights." *Id.* at 1298. In stark and clear contrast here, the Fourth Circuit refused to order dismissal of *any part* of the complaint, even those parts charging that petitioners "presented knowingly false and misleading statements before the Select Committee on November 28, 1978." Amended Complaint ¶ 6(k), Appendix D, *infra* p. 49a.

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In *United States* v. *Helstoski*, 635 F.2d 200 (3d Cir. 1980), after consideration by this Court of Congressman Helstoski's claims that charges in an indictment alleging introduction of private immigration bills violated the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), the court of appeals determined that an indictment which charges the performance of legislative acts, and which was "utterly dependent" upon legislative acts, 635 F.2d at 202, must be dismissed in its entirety even as to obstruction of justice and perjury counts since the court determined that it was "unrealistic [to make] any attempt to cull out single counts." *Id.* The complaint here is substantially dependent upon and interlarded with allegations that legislative acts were performed. Each count reincorporates and adopts the allegations of investigative acts recited in Count I, Appendix D, *infra* pp. 46a–54a, making it impossible to isolate those counts "bearing directly on legislative acts" from those which do not. *United States* v. *Helstoski, supra* at 202. The court below utterly ignored the unequivocal allegations in the complaint charging the performance of antecedent and subsequent legislative acts, while conceding that the Select Committee was engaged in a validly authorized investigation of abuses in the sale of cancer insurance, Appendix A, *infra* p. 2a, in direct conflict with the law of the District of Columbia and Third Circuits requiring, at the very least, dismissal of the parts of the complaint which charge investigative or other legislative acts.

C. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A major reason for granting certiorari in this case is that the decision below decides a "federal question in a way in conflict with applicable decisions" of the Supreme Court, Rule 17.1(c), Supreme Court Rules, most notably, *Eastland* v. *United States Servicemen's Fund, supra. Eastland* involved a lawsuit brought against the Members and staff of a Senate Committee seeking to enjoin implementation of a subpoena and alleging, like the complaint here, that the motives for the legislative activity were improper:

> The sole purpose for the issuance of the aforesaid subpoena by the defendant Committee members and staff is to harass, chill, punish and deter plaintiffs in their exercise of their rights and duties under the First Amendment.

Amended Complaint ¶ 18 *reprinted in* Joint Appendix at 16, *Eastland, supra,* and "is part of a broad scheme by various branches of the Government to use and abuse the power of the subpoena to stifle freedom of the press." *Id.* ¶ 19.

The complaint in this case contains identical allegations. It charges that Petitioner, (congressional investigator Gardner) "falsely represented [to Benford] that she was vitally interested in becoming an independent agent of American Family when in fact she was merely establishing herself to investigate the

operation of Benford for the Select Committee." Amended Complaint, Count III, ¶(d), *Benford* v. *American Broadcasting Companies, Inc., et al.* Appeal No. 81–1200 (4th Cir., June 17, 1981) Appendix D, *infra* pp. 47a–48a.

In *Eastland, supra,* this Court ordered dismissal of the action against the Members and their aides and held the activity absolutely protected, notwithstanding the allegation in the complaint that the activity abridged the First Amendment and was unlawful. 421 U.S. at 503.

Similarly, in *Gravel* v. *United States,* 408 U.S. 606 (1972), this Court held that a congressional aide's statements to a Member during the term of employment and related to any legislative act, including the conduct of a committee hearing, could not be questioned by a grand jury investigating publication of the Pentagon Papers. 408 U.S. at 629. Respondent's complaint charges, *inter alia,* that petitioner Gardner "presented knowingly false and misleading statements before the Select Committee on November 28, 1978" Amended Complaint, Count III, ¶6, Appendix D, *infra* p. 49a. It is beyond peradventure of doubt under *Gravel* that Petitioners' communications with Members of the Select Committee cannot form the basis of liability and yet the court of appeals, like the district court, refused to dismiss a complaint grounded on those acts.

In *Doe* v. *McMillan,* 412 U.S. 306 (1973), this Court held that statements in committee reports, as well as

utterances in committee hearings, are protected legislative acts. The complaint in this case, alleges that Petitioner Gardner terminated her employment relationship to Respondent not for "personal reasons," as she stated, but that in fact "she was terminating because of her *contemplated report to the Select Committee,* her employer, on November 28, 1978." Amended Complaint, Count III, ¶6(j), (emphasis added) Appendix D, *infra* p. 49a.

Finally, this Court has made it abundantly clear that the "motives" for the performance of legislative acts, even if "unworthy," may not be subject to judicial questioning under the Clause. *United States* v. *Brewster,* 408 U.S. 501, 523 (1972); *Tenney* v. *Brandhove,* 341 U.S. 367, 377 (1954). Respondents complaint impugns and implicates the motives of the Congressional investigators and the legislative acts performed in arranging and conducting the meeting. Congressional investigators "Gardner, Hamburger, Teitelbaum and Holton conducted a clandestine meeting on November 3, 1978 as an apparently *bona fide* meeting to study and avail Hamburger and Teitelbaum of Cancer Insurance coverage, whereas, in fact, it was for an unlawful surveillance to obtain information for the Select Committee. . ." Amended Complaint, Count III ¶6(h), Appendix D, *infra* p. 48a. The court of appeals failed to follow the dictates of *United States* v. *Brewster, supra,* in permitting a complaint to survive which so directly and boldly questions investigative information gathering and the motives therefor.

Finally, in *Eastland* v. *United States Servicemen's Fund, supra,* the court emphatically rejected the argument that the Clause was subject to an "illegality exception," even for the limited purpose of protecting an individual's constitutional rights. In that case, a Senate subcommittee subpoenaed bank records of various organizations which claimed their First Amendment rights would be violated by compliance. Respondents there contended that seizure of their bank records invaded their privacy and therefore no impediment existed to suing the Members and their aides. The Court rejected the argument that "once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights . . . [because that approach] ignores the absolute nature of the speech or debate protection," *Eastland, supra* at 509, and "would create an exception not warranted by the language, purposes, or history of the Clause." *Id.* at 510. As explained above, the court of appeals refused to dismiss the counts averring legislative acts and adopted the district court's holding that "[d]espite the constitutionality of the conduct at issue, this Court does not believe that Speech or Debate Clause protection extends to legislative aides whose investigatory activities constitute a violation of state and federal statutes." Appendix C, *infra* pp. 35a–36a. The notion that the mere allegation of violations of state or federal statutes serves to divest a legislator or his aides of their constitutional speech or debate protection for legislative acts directly repudiates the clear holdings of this court in *Eastland.*

D. THE DECISION OF THE COURT OF APPEALS DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Certiorari is appropriate where the court of appeals decides an important question which has not been, but should be, settled by this court. Supreme Court Rule 17.1(c). Both lower courts refused to accord Speech or Debate protection to the November 3, 1978 meeting as well as the preparatory acts conducted by petitioners in seeking trainee positions, purchasing policies, observing Respondent's techniques and reporting these matters to the Select Committee and yet courts have recognized that there is "no doubt that information gathering, whether by subpoena or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation." *McSurely* v. *McClellan,* 553 F.2d at 1286.

The applicability of the Speech or Debate Clause protection to valid investigative activity through "field work" by staff is an "important question" since it: (1) goes to the heart of the ability of Congress to gather accurate information so that it may legislate "wisely" and effectively. *McGrain* v. *Daugherty,* 273 U.S. 135, 175 (1927) and: (2) to so severely circumscribe the information gathering function so as to prevent ascertainment of "the conditions which the legislation is intended to affect or change," *id.,* through informal means like those utilized by the Select Committee will diminish the efficacy of Congress' legislative function. This has an effect broadly on the entire Congress and the other investigative

committees as well and not only on these litigants, a factor weighing in favor of review. As this Court has emphasized, the concept of importance relates to the importance of the issues "to the public as distinguished from that of the parties" *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79 (1959).

Although the Court has previously addressed the investigative function, and suits based on the exercise of that power both directly, *Eastland, supra, McGrain, supra* and indirectly, *Watkins* v. *United States,* 354 U.S. 178 (1957) (contempt of Congress); *United States* v. *Rumely,* 345 U.S. 41 (1953) (same), it has never squarely addressed the parameters of "field work" by Congressional investigators. Cf. *Hutchinson* v. *Proxmire,* 442 U.S. 111, 124 (1979) (committee hearings protected even if held outside the Chambers).

Accordingly, the petition represents an appropriate case in which to do so.

E. LOWER COURTS NEED A REMINDER THAT THE SPEECH AND DEBATE CLAUSE APPLIES TO QUESTIONING AT TRIAL, NOT JUST TO LIABILITY FOLLOWING THE TRIAL

The appropriateness of granting certiorari in this case is heightened by the Fourth Circuit's erroneous ruling that the Speech and Debate Clause would be activated here only "if the congressional defendants factually demonstrate [at trial] that their involvement

in the taping was protected legislative acivity." Appendix A, *infra* p. 3a.

The ruling reflects a common misapprehension of the scope of the Speech and Debate Clause. The Clause provides that legislators "shall not be questioned in any other Place" and prohibits "exposure" to being questioned *before* trial occurs. *Helstoski* v. *Meanor, supra* at 508. That means they shall not be questioned in a trial, among other places. Thus, if it appears from the pleadings in this case that legislative acts are being called into question, the Clause demands that such allegations be dismissed forthwith so that the legislative agents will not be questioned at trial concerning their legislative activities.

That constitutional concept is at the heart of this case. If Petitioners are right that the critical portions of the complaint charge legislative actions within the meaning of the Clause summary judgment on those portions must be awarded the Petitioners now. It will not do to have them questioned further at the trial on the merits on these portions of the complaint. Any trial must be limited to the portion of the complaint that deals with non-legislative actions.

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CONCLUSION

For all the foregoing reasons, review by this Court is plainly warranted and the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 4, 1981

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 81-1200

GEORGE H. BENFORD, APPELLEE

v.

AMERICAN BROADCASTING COMPANIES, INC., A NEW YORK CORPORATION, DEFENDANT

AND

MRS. ISSAC (BETTY) HAMBURGER, MISS KATHLEEN T. GARDNER, MRS. LILLIAN M. TEITELBAUM, AND DAVID L. HOLTON, APPELLANTS

AND

MARGARET OSMER, DEFENDANT

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge

Argued May 6, 1981

Decided June 17, 1981

Before HAYNSWORTH, *Senior Circuit Judge,* HALL and MURNAGHAN, *Circuit Judges.*

Steven R. Ross, Assistant Counsel to the Clerk, U.S. House of Representatives (Stanley M. Brand, General Counsel to the Clerk, Michael L. Murray, Office of the Clerk on brief) for Appellants; Wilson K. Barnes and Dean E. Sharp for Appellee.

Per curiam: Plaintiff, an independent agent of the American Family Life Insurance Company, filed an action against four staff members employed by the Select Committee on Aging of the United States House

of Representatives (the "congressional defendants"), the American Broadcasting Company, and an ABC employee. The complaint alleged that, during a Committee investigation of abuses in the sale of insurance to the elderly, one congressional defendant infiltrated the plaintiff's business as a trainee and arranged a meeting at which the plaintiff presented his standard cancer insurance promotion to two elderly women, also employees of the committee. Without the plaintiff's knowledge or consent, the meeting was videotaped by ABC and portions of that tape were subsequently broadcast on the ABC Nightly News. The plaintiff then filed an action for money damages, asserting that the defendants' conduct was unconstitutional, violative of state and federal statutes, and tortious. Although the Fourth Amendment claim was ultimately dismissed, the district court denied the congressional defendants' motion for dismissal or summary judgment based on the Speech or Debate Clause or, alternatively, the doctrine of absolute official immunity. *Benford* v. *American Broadcasting Co.*, 502 F.Supp. 1148 (D.Md. 1980). The congressional defendants then filed an interlocutory appeal.

At the outset, we note that this court properly has jurisdiction of this appeal under 28 U.S.C. § 1291. The denial of a dismissal motion based on the Speech or Debate Clause is an appealable final decision under the collateral order doctrine. *Helstoski* v. *Meanor*, 442 U.S. 500 (1979). We may review the rejection of the alternative basis for dismissal as an incidental exercise of

this court's power over the Speech or Debate question. *See also Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1986 (5th Cir. 1973).

We affirm, for reasons adequately stated in the opinion of the district court.[1] Liability may not be predicated on "legislative acts" performed by the congressional defendants. They may be held accountable in a private civil action for acts not legislative in nature that are unconstitutional, illegal, or tortious. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). The Supreme Court's decisions leave no doubt that, as a matter of law, the public broadcast of the taped meeting was not an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States*, 408 U.S. 606, 625 (1972). Nor, at this point in the proceedings, does the record establish with sufficient strength to justify summary disposition that the congressional defendants' involvement in the taping of the meeting by ABC was a legislative act. Our ruling does not foreclose a contrary decision on a motion for summary judgment or at trial if the congressional defendants factually demonstrate that their involvement in the taping was protected legislative activity.

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[1] Like the district court, we intimate no view as to whether the plaintiff has stated a valid claim, or whether the defendants might successfully assert other defenses.

Similarly, our decision on the Speech or Debate question forecloses dismissal at this early stage under the common-law doctrine of absolute immunity announced in *Barr* v. *Matteo*, 360 U.S. 564 (1959). *See Doe* v. *McMillan*, 412 U.S. 306, 318-24 (1973).

Because the question is not properly presented by a cross-appeal, we express no view as to the correctness of the district court's ruling that the congressional defendants may be entitled to qualified immunity under *Butz* v. *Economou*, 438 U.S. 478 (1978).

Affirmed.

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 81-1200

GEORGE H. BENFORD, APPELLEE

v.

AMERICAN BROADCASTING COMPANIES, INCORPORATED, A NEW YORK CORPORATION, DEFENDANT

AND

MRS. ISSAC (BETTY) HAMBURGER, MISS KATHLEEN T. GARDNER, MRS. LILLIAN M. TEITELBAUM, AND DAVID L. HOLTON, APPELLANTS

AND

MARGARET OSMER, DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, AFFIRMED.

/s/ WILLIAM K. SLATE, *Clerk*.

Dated: June 17, 1981.

APPENDIX B

In the United States District Court
for the District of Maryland

Civil Action No. N–79–2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., *and* MRS. ISAAC (BETTY) HAMBURGER *and* MISS KATHLEEN T. GARDNER *and* MRS. LILLIAN M. TEITELBAUM *and* DAVID L. HOLTON *and* MARGARET OSMER

Filed: November 14, 1980.

Wilson K. Barnes of Baltimore, Maryland and Dean E. Sharp of Washington, D.C., for plaintiffs.

Alan I. Baron and Ellen Scalettar of Baltimore, Maryland, for defendants American Broadcasting Company, Inc. and Margaret Osmer.

Stanley M. Brand, Steven R. Ross and Michael L. Murray of Washington, D.C., for defendants Miss Kathleen T. Gardner, Mrs. Lillian M. Teitelbaum, David L. Holton and Mrs. Isaac (Betty) Hamburger.

NORTHROP, *Chief Judge:*

Plaintiff, George H. Benford, instituted the instant action in the Circuit Court for Baltimore County [1]

[1] Defendants removed this action to federal court by filing a Petition for Removal on December 27, 1979. Plaintiff filed a Motion to Remand on January 10, 1980, that was denied by this Court on March 7, 1980.

against American Broadcasting Companies, Inc. (ABC), Margaret Osmer, an ABC employee, David L. Holton, Chief Investigator for the Select Committee on Aging, United States House of Representatives (Select Committee), Kathleen T. Gardner, professional staff member of the Select Committee, and Betty Hamburger and Lillian M. Teitelbaum, both special senior citizen investigators of the Select Committee. Defendants Holton, Gardner, Hamburger, and Teitelbaum will hereinafter be referred to collectively as the "congressional defendants."

This case arose from the events surrounding the Select Committee's investigation of abuses in the sale of supplemental health insurance to the elderly. Plaintiff Benford is an independent agent of the American Family Life Assurance Company of Columbus, Georgia. His responsibilities include the recruitment and training of independent agents for American Family. On October 20, 1978, and as part of the Select Committee's investigation, defendant Gardner visited Benford's office and expressed her desire to serve as an independent agent. Unaware that Gardner was a member of the Select Committee's investigatory team, Benford hired Gardner as an independent agent.

On or about November 1, 1978, Gardner informed Benford that a friend knew of two elderly women who were interested in learning about American Family's cancer policy. Stating that she was not confident in her ability to handle the sale herself, Gardner asked Benford to accompany her to the meeting. Benford agreed and arrangements were made to meet with the two

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women, defendants Hamburger and Teitelbaum, at the home of Hamburger in Pikesville, Maryland. On November 3, 1978, Benford and Gardner arrived at Hamburger's home where they were met by defendants Hamburger, Teitelbaum, and Holton, who introduced himself as the friend of Gardner who recommended the meeting.

At the meeting, Benford presented his standard cancer insurance promotion to the women. Without Benford's knowledge or consent, the November 3 meeting at Hamburger's home was taped by ABC. On November 28 and 29, 1978, portions of the taped meeting were broadcast on the ABC Nightly News. Following this broadcast, Benford learned that the congressional defendants were part of the Select Committee's investigatory team. As a result of the alleged actions by ABC and the congressional defendants, Benford has instituted the present action claiming that the taping and broadcasting subjects the defendants to liability under the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. §§ 10–401, *et seq.*, the fourth amendment of the Constitution, the Federal Eavesdropping Statute, 18 U.S.C. §§ 2510, *et seq.*, and the common law torts of civil conspiracy, malicious interference with business relations, and invasion of privacy.

The congressional defendants have filed a motion to dismiss, or alternatively for summary judgment, as to each cause of action. Because both sides have submitted affidavits, the Court will treat defendants' motion as a motion for summary judgment. In addi-

tion, the congressional defendants have moved for a protective order staying all discovery until the motions presently before the Court are resolved. These motions raise an important question regarding the congressional defendants' immunity from suit. At present, therefore, this Court is deciding only the threshold question of legislative immunity. The Court is not addressing whether plaintiff has alleged valid causes of action in Counts I through VI. Although the congressional defendants have based their motion to dismiss, or alternatively for summary judgment, on a variety of grounds, this Court is only deciding whether the motion should be denied or granted on the basis of legislative immunity.

In their motion to dismiss, or alternatively for summary judgment, and their motion for a protective order, the congressional defendants contend that their conduct is protected by the Speech or Debate Clause of the Constitution and/or the common law doctrine of official immunity. In considering the congressional defendants' contention, it is important to note that some of the counts in the plaintiff's complaint deal exclusively with the actual taping while others require an examination of both the taping and the subsequent broadcast. As a result, in addressing the issue of legislative immunity, this Court must consider whether the taping, the broadcasting, or both, are absolutely protected by the Speech or Debate Clause or the doctrine of official immunity.

For the reasons set forth below, it is the opinion of this Court that neither the taping nor the subsequent

broadcasting is absolutely protected by either the Speech or Debate Clause of the doctrine of official immunity. Upon showing that the taping and the broadcasting were properly authorized, however, the congressional defendants will be entitled to assert a defense of qualified immunity.[2] This defense only protects the defendants if they meet their burden of proving that they acted reasonably and in good faith. Whether this is a viable defense under these circumstances, therefore, cannot be a resolved at this stage in the proceedings.

THE SPEECH OR DEBATE CLAUSE

The congressional defendants' primary contention is that their conduct is absolutely protected by the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1.[3] The Speech or Debate Clause was included in the Constitution to insure the independence of the legislative branch and to protect legislators "not only

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[2] Following a hearing on the questions addressed in this opinion on October 16, 1980, this Court opined that defendants were not entitled to immunity under either the Speech or Debate Clause or the doctrine of official immunity. This Court's oral observation of October 16 is amended to the extent that, upon a proper showing, the congressional defendants are entitled to assert a defense of qualified immunity.

[3] Art. I, § 6, cl. 1 of the Constitution provides:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). *See also United States* v. *Brewster*, 408 U.S. 501, 507 (1972). As the Supreme Court explained in *Powell* v. *McCormack*, 395 U.S. 486 (1969), "[t]he purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Id.* at 505.

The Supreme Court has construed the Speech or Debate Clause few times in its history. See *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979); *United States* v. *Helstoski*, 442 U.S. 477 (1979); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe* v. *McMillan*, 412 U.S. 306 (1975); *Gravel* v. *United States*, 408 U.S. 606 (1972); *United States* v. *Brewster*, 408 U.S. 501 (1972); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *United States* v. *Johnson*, 383 U.S. 169 (1966); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). In these cases, the Court has read the Speech or Debate Clause "broadly to effectuate its purposes. . . ." *United States* v. *Johnson*, 383 U.S. at 180. Among the actions the Court has deemed protected under the Clause are voting by legislators, the preparation of committee reports, and conduct at legislative committee hearings. *See Gravel*, 408 U.S. at 624. In addition, "a published report may, without losing Speech or Debate Clause

protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." *Doe* v. *McMillan,* 412 U.S. at 312.

Moreover, the Court has unequivocally declared that the Speech or Debate Clause protects legislative aides as well as the legislators themselves. In *Gravel,* the Court stated that "for the purpose of construing the privilege a Member and his aide are to be 'treated as one,'. . . ." 408 U.S. at 616 (quoting from *United States* v. *Doe,* 455 F.2d 753, 761 (1st Cir. 1972)). The Court has indicated, however, that the protection afforded legislative aides may not be as great as that afforded the legislators. As the Court stated in *Dombrowski,* "This Court has held, however, that this doctrine is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." 387 U.S. at 85. Similarly, in *Tenney* v. *Brandhove,* the Court declared that when a legislator is sued the Clause "deserves greater respect than where an official acting on behalf of the legislature is sued. . . ." 341 U.S. at 378.

Although the Speech or Debate Clause has been broadly construed, the Court has placed definite limits on the scope of its protection. In *Gravel,* the Court defined the scope of the Clause as follows:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings* with respect

> to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals puts it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."

408 U.S. at 625 (quoting from *United States v. Doe*, 455 F.2d at 760) (emphasis added). As the Court explained in *Brewster*,

> In no case has this Court ever treated the clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.

408 U.S. at 515–16 (footnotes omitted). Thus, the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process." *Id.* at 517.

This Court will now separately consider whether either the taping or the subsequent broadcasting is within the scope of absolute protection afforded by the Speech or Debate Clause.

A. THE PUBLIC BROADCAST OF THE TAPED NOVEMBER 3 MEETING

As part of the ABC Nightly News on November 28 and 29, 1978, ABC aired excerpts from the tapes made of Benford's meeting with the congressional defendants. The Court must first address whether this public broadcast was conduct protected by the Speech or Debate Clause. Applying the *Gravel* standard, there-

fore, the Court must determine whether the broadcast was "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings . . ." *Gravel*, 408 U.S. at 625.

In recent decisions concerning the scope of the Speech or Debate Clause, the Supreme Court has exhibited a reluctance to extend the protective shield to the private publication of materials obtained in the course of legitimate legislative activity.

In *Gravel*, the Supreme Court considered whether a grand jury had the power to subpoena an aide of a United States senator for questioning with regard to the senator's arrangement for the private publication of classified documents. In June 1971, Senator Mike Gravel convened a meeting of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee and there read extensively from a copy of the Pentagon Papers. The entire 47 volumes of the study were then placed in the public record. Soon thereafter, Senator Gravel arranged for publication of these papers by Beacon Press. The Supreme Court held that, though the motives behind the Senator's conduct at the subcommittee meeting were protected by the Speech or Debate Clause, the arrangement for the publication by Beacon Press was not. The *Gravel* Court explained that the "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the

Senate by impermissibly exposing its deliberations to executive influence." *Id.*

The Court faced a similar question in *Doe* v. *McMillan, supra.* In *Doe*, parents of District of Columbia school children brought an action against congressional committee members and aides, and executive officials, seeking damages and injunctive relief for invasion of privacy resulting from the dissemination of a congressional report on the District of Columbia school system that included identification of students in a derogatory context. The *Doe* Court took a step beyond *Gravel* holding that even congressional authorization does not immunize the publication and distribution of materials "which allegedly infringe upon the rights of individuals." 412 U.S. at 314.

The United States Court of Appeals for the District of Columbia in *McSurley* v. *McClellan*, 553 F. 2d 1277 (D.C. Cir. 1976) (en banc), followed the Supreme Court decisions in *Gravel* and *Doe*. In *McSurley*, plaintiffs instituted an action against a United States senator and two of his aides for an alleged violation of plaintiffs' constitutional rights. The action arose in part from defendants' appropriation and use of materials taken from plaintiffs' home in the course of an unlawful search. Copies of these documents were later disseminated to persons or agencies outside the subcommittee. In holding the public distribution unprotected, the District of Columbia stated: "To the extent plaintiffs charge dissemination outside of the Halls of Congress, the federal defendants are not immune to further questioning." *Id.* at 1285.

Hutchinson v. *Proxmire, supra,* is the most recent attempt by the Supreme Court to define the scope of "legitimate legislative activity." *Proxmire* arose from Senator Proxmire's award of the "Golden Fleece of the Month Award" to publicize wasteful government spending. One such award was given to federal agencies involved in the funding of plaintiff's study of emotional behavior. In publicizing the award, Senator Proxmire distributed a press release and a newsletter that incorporated defamatory statements made in a speech given by him.[4] The question before the Court was whether the private republication of the Senator's speech through the press release and newsletter was absolutely protected by the Speech or Debate Clause.

The *Proxmire* Court reaffirmed the *Gravel* definition of the scope of the Clause stating that, to be immune, legislative acts "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings. . . ." 443 U.S. at 126 (quoting from *Gravel,* 408 U.S. at 625). Following *Gravel* and *Doe* v. *McMillan,* the Court stated that, though

> [a] speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record[,] . . . neither the newsletters nor the press release was "essential to the deliberations of the Senate" and neither was part of the deliberative process.

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[4] There is apparently some question as to whether Senator Proxmire actually delivered the speech on the Senate floor or merely had the speech read into the Congressional Record. *See Proxmire,* 443 U.S. at 116 n.3.

Id. a 130 (quoting from *Gravel*, 408 U.S. at 625). If the Supreme Court saw fit to deny a senator Speech or Debate Clause protection for the private publication of a speech properly contained in the Congressional Record, there is little reason for this Court to immunize the conduct of committee investigators in arranging for the publication of materials acquired in the course of a legislative investigation.

It is the opinion of this Court that, like the public dissemination of materials in *Gravel*, *Doe*, *McSurley*, and *Proxmire*, the publication of the taped meeting of November 3 was not "an integral part of the deliberative and communicative processes" of the Select Committee. It is not necessary for this Court to pass on whether the tapes could have been properly used in another context. This Court is merely stating that it sees no legitimate reason for the publication of portions of the taped meeting on the ABC Nightly News.

The congressional defendants contend that the publication was justified in furtherance of the "informing function" of Congress.[5] The Supreme Court, however,

[5] In explaining the importance of the legislature's "informing function," Justice Douglas quoted from a variety of sources as follows:

"[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees . . . . The informing function of Congress should be preferred even to its legislative function." W. Wilson, Congressional Government 303 (1885) quoted with approval in Tenney v. Brandlove, . . . 341 U.S. at 377 n.6 . . . "From the earliest times in its history, the Congress has assiduously performed an 'informing function,'" Watkins v. United States 354 U.S. 178, 200 n. 33 . . . . "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them." Bond v. Floyd, 385 U.S. 116, 136 . . . .

has never advocated a broad reading of the "informing function." Certainly, the Court has never used this rationale to justify the immunization of the public distribution of injurious materials. As the Court stated in *Doe* v. *McMillan*, "we cannot accept the proposition that our conclusion, that general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause, will seriously undermine the 'informing function' of Congress." 412 U.S. at 317. More recently, the Supreme Court declared that: "Valuable and desirable as [the informing function] may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process." *Proxmire*, 443 U.S. at 133. Accordingly, though this Court does not question the value of the "informing function" of Congress, this Court sees no legitimate reason for using it as a means of protecting the publication of materials injurious to private individuals.

B. THE TAPING OF THE NOVEMBER 3 MEETING

Having determined that the broadcast on the ABC Nightly News is unprotected by the Speech or Debate Clause, this Court must now address the more difficult question of whether the conduct of the congressional defendants in surreptitiously taping the November 3 meeting is deserving of such protection. In asserting their right to Speech or Debate Clause protection, the congressional defendants stress the appropriateness of

the investigation. They emphasize that the investigatory tactics utilized in this case were necessary to obtain accurate and reliable information.

Although the legislative branch has broad investigatory power,[6] "a Member of Congress or congressional employee is not free to use every conceivable means to obtain investigatory materials, without fear of criminal prosecution or civil suit." *McSurley* v. *McClellan*, 553 F. 2d at 1287. In *Gravel*, the Supreme Court noted that in prior decisions it had taken "a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." 408 U.S. at 620. More specifically, the *Gravel* Court explained that

> no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or *if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen.* Neither they nor their aides should be immune from liability or questioning in such circumstances.

Id. at 621 (emphasis added).

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[6] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) in which the Court stated: "To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserable reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" *Id.* at 505 (quoting from United States v. Brewster, 408 U.S. at 524). *See also* Doe v. McMillan, 412 U.S. at 313; McCrain v. Daugherty, 273 U.S. 135, 175 (1927).

In *Dombrowski* v. *Eastland, supra,* the Supreme Court faced facts similar to those in the instant case. In *Dombrowski,* plaintiff brought an action against the Chairman and counsel of a Senate subcommittee. Plaintiff claimed that, while in the process of gathering information for a hearing, the defendants conspired with Louisiana officials to seize plaintiff's property by unlawful means in violation of plaintiff's fourth amendment rights.[7] The *Dombrowski* Court held that the Speech or Debate clause does not protect the committee counsel against an alleged violation of an individual's fourth amendment rights.[8] Therefore, *Dombrowski* appears to stand for the proposition that a legislative aide is not immune when an individual claims a violation of his fourth amendment rights, provided the plaintiff has set forth facts showing a genuine issue for trial.

In *McSurley* v. *McClellan,* a legislator and two of his aides were sued for conspiring with state officials to effect an unlawful search and seizure. The District

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[7] The Louisiana courts held the arrests and searches illegal because the warrants secured by the police were not supported by a showing of probable cause. *See* Dombrowski, 387 U.S. at 83.

[8] The Court agreed with the lower courts' dismissal of the complaint as to the committee Chairman because "[t]he record [did] not contain evidence of his involvement in any activity that could result in liability." As to the committee counsel, however, the Court noted that there was "controverted evidence in the record . . . which affords more than merely colorable substance" to plaintiff's claim that there had been an unconstitutional infringement upon his fourth amendment rights. *Id.* at 84.

of Columbia Circuit unequivocally declared that the employment of unlawful or unconstitutional methods of investigative inquiry is "no part of the legislative process or function; it is not a legislative act." *McSurley* v. *McClellan*, 553 F.2d at 1288 (quoting from *Brewster*, 408 U.S. at 526). The *McSurley* court, like the Supreme Court in *Dombrowski*, refused to extend the shield of the Speech or Debate Clause to allegedly unlawful or unconstitutional investigatory practices.

As in both *Dombrowski and McSurley*, plaintiff in the instant action has alleged that the taping of the November 3 meeting was both unlawful and unconstitutional. Without deciding whether the actions of the congressional defendants were unlawful or unconstitutional, and, if so, if other defenses are available, this Court is of the view that there is sufficient evidence in the record "which affords more than merely colorable substance" to plaintiff's claims. *See Dombrowski*, 387 U.S. at 84.

Moreover, the gravity of plaintiff's allegations are not mitigated by the possibility that a court might have granted a request by the congressional defendants to allow the taping of the meeting. As the *McSurley* court explained, "Instead of acting lawlessly, the Subcommittee investigator should have used proper process which, in turn, would have permitted the court, if it granted the request . . . to safeguard against encroachment beyond the legitimate legislative sphere, into personal and private papers that lacked even arguable relevanace to the legislative inquiry." 553 F.2d at 1292. The congressional defend-

ants in the instant action had ample opportunity to request judicial permission prior to the meeting of November 3. Such permission is vital to "safeguard encroachment beyond the legitimate legislative sphere."

It is not necessary, at this point in the proceedings, for this Court to explore the appropriateness of issuing an order under the facts of the present action. This Court merely makes the point that no court order was sought to tape the conversation, even for the purposes of using the tapes at a committee hearing or to aid in drafting a committee report.

II.

THE DOCTRINE OF OFFICIAL IMMUNITY

Having determined that the Speech or Debate Clause protects neither the broadcasting nor the taping, our inquiry is not at an end. The congressional defendants contend that if it is adjudged that they are not absolutely immune under the Speech or Debate Clause, they are entitled to absolute or qualified immunity under the doctrine of official immunity. To the extent that their conduct is authorized, this Court is of the view that the congressional defendants are entitled to assert a qualified immunity.

The judicially created doctrine of official immunity confers immunity on government officials for discretionary acts within the scope of their authority. This doctrine is designed to reconcile two important considerations,

> on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Barr v. *Matteo*, 360 U.S. 564, 565 (1959).

In *Barr*, the Supreme Court reaffirmed the official immunity doctrine. In that case, the acting director of a federal agency was sued for malicious defamation by two employees whose suspension for misconduct was announced in a press release. The Court concluded that the press release was "within the outer perimeter of the [acting director's] line of duty" and "was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." *Id.* at 575. Consequently, the Court held that a false and injurious publication, the issuance of which was otherwise within the scope of his authority, was not actionable notwithstanding that its issue was allegadly malicious.

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Supreme Court limited the absolute immunity afforded to federal officials by its decision in *Barr*. In *Butz*, federal agency officials were sued for the wrongful initiation of administrative proceedings against the plaintiff. The Court held that when federal officials are sued for allegedly unconstitutional conduct they are entitled only to the qualified immunity de-

scribed in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).[*] 438 U.S. at 507. The Court explained that the removal of absolute protection would not render the federal officials liable for mere mistakes in judgment. It would, however, make federal officials liable if they knew or reasonably should have known that their conduct violated the Constitution. *Id.*

The *Butz* Court utilized the definition of qualified immunity that the Court applied to state officials in *Scheuer*. The *Scheuer* Court explained that

> in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer, 416 U.S. at 247–48. The Court subsequently applied the *Scheuer* standard in *Wood* v. *Strickland*, 420 U.S. 308 (1975), stating that a school board member would not be immune if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took

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[*] The Court in *Butz* explained, however, that federal officials may be afforded absolute immunity in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 438 U.S. at 507.

the action with the malicious intention to cause a deprivation of constitutional rights or *other injury to the student.*" *Id.* at 322 (emphasis added).

The scope of official immunity is directly related to the degree of authorization. As the Supreme Court explained in *Doe* v. *McMillan,* "The scope of immunity has always been tied to the 'scope of . . . authority.' " 412 U.S. at 320 (quoting from *Wheeldin* v. *Wheeler,* 373 U.S. 647, 651 (1963)). To be entitled to official immunity, therefore, the federal officials must show that their conduct was authorized. The mere fact that certain conduct is authorized, however, is insufficient, in itself, to immunize the conduct of federal officials. *See Doe* v. *McMillan,* 412 U.S. at 322. In addition to showing proper authorization, the federal officials must show that they acted reasonably and in good faith.

Although commonly applied to officials within the executive branch of government, the official immunity doctrine is applicable to members of the legislative branch. In *Doe* v. *McMillan,* the Supreme Court specifically stated that "[b]oth before and after *Barr,* official immunity has been held applicable to officials of the Legislative Branch." 412 U.S. at 319 n.13.[10] A number of lower courts have also recognized the pos-

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[10] *But see* Davis v. Passman, 442 U.S. 228 (1979) in which the Court explained:

"The decision of the panel of the Court of Appeals for the Fifth Circuit found that [Representative Passman] was not foreclosed "from asserting the same qualified immunity available to other government officials. . . ." The en banc Court of Appeals did not reach this issue, and accordingly we express no view concerning its disposition by the panel."

Id. at 246 n.25.

sibility of extending the official immunity doctrine to legislative officials. The District of Columbia Circuit in *McSurley,* for example, after holding that the legislative defendants were not absolutely protected by the Speech or Debate Clause, acknowledged that "there may be available to [the defendant] a qualified defense to the damages action (not an absolute immunity from suit) of 'good faith and reasonable belief in the validity of the search'. . . ." *McSurley* v. *McClellan,* 553 F.2d at 1291 n.50 (quoting from *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 456 F.2d 1339, 1348 (2d Cir. 1972)) (the *McSurley* court expressly asserted, however, that this was a matter on which it expressed no opinion).[11] Similarly, in *Davis* v. *Passman,* 544 F.2d 865 (5th Cir. 1977), *aff'd en banc,* 571 F.2d 792 (5th Cir. 1978), *rev'd on other grounds,* 442 U.S. 228 (1979), the Fifth Circuit declared that "[t]he inapplicability of speech or debate protection does not foreclose Representative Passman from asserting the same qualified immunity available to other government officials." *Id.* at 881.

Absolute official immunity, when applied to the legislative branch, is at most coextensive with the ab-

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[11] In his dissenting opinion in *McSurley,* Judge Wilkey clearly assumed that absent the absolute protection of the Speech or Debate Clause the legislative defendants would have access to qualified official immunity. After acknowledging the majority's decision to deny the Senator and his aides immunity under the Speech or Debate Clause, Judge Wilkey stated that "[o]f course, the defendants will have the protection of qualified immunity, as in *Bivens* v. *Six Unknown Agents* or *Scheuer* v. *Rhodes.*" *McSurley* v. *McClellan,* 553 F.2d at 1304–05 (Wilkey, J., dissenting) (footnotes omitted).

solute protection afforded by the Speech or Debate Clause. In the panel opinion in *Davis* v. *Passman*, the Fifth Circuit, though allowing Representative Passman qualified immunity, denied him the right to absolute official immunity stating: "The inapplicability of speech or debate protection does, however, foreclose Representative Passman from asserting an absolute official immunity such as that recognized in *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) [(absolute immunity accorded a state prosecutor)]. Speech or debate protection is coextensive with the need to afford members of Congress absolute immunity." 544 F. 2d at 881. Similarly, this Court sees no justifiable reason for affording the congressional defendants absolute official immunity when these officials are not deserving of absolute protection under the Speech or Debate Clause. The right of legislative officials to absolute immunity is limited to the protection accorded by the Speech or Debate Clause.

Moreover, the scope of absolute official immunity recognized in *Barr* v. *Matteo* was greatly limited by the Supreme Court's decision in *Butz*. The Court in *Butz* held that in a suit alleging unconstitutional action, federal officials were only entitled to absolute immunity in "exceptional situations." 438 U.S. at 507.[12] It is the opinion of this Court that absolute im-

[12] The Court noted that judges and prosecutors were examples of officials who were deserving of absolute immunity. Butz, 438 U.S. at 508–17.

munity is not essential to safeguard the interests of legislative investigators. For the foregoing reasons, therefore, the congressional defendants in the present action do not enjoy absolute official immunity.

The qualified immunity of *Butz* and *Scheuer*, which the Court has held applicable to federal executive officers, should be equally applicable to legislative officers. There is no rational reason to afford executive investigators greater protection than members of the legislative branch. Moreover, extending a qualified protction to legislative investigators serves to safeguard the constitutional rights of private individuals without unduly frustrating the ability of Congress to legislate effectively. To the extent that the broadcasting and taping were authorized, therefore, the congressional defendants may assert qualified immunity. A decision on the viability of this defense, however, must await further proceedings.

III.

CONCLUSION

In conclusion, this Court holds that the congressional defendants are not absolutely immune under either the Speech or Debate Clause or the official immunity doctrine. Upon a proper showing, however, they are entitled to assert a defense of qualified immunity as defined by the Supreme Court in *Butz*. Accordingly, to the extent that the congressional defendants have asserted absolute immunity as a basis for their motion to dismiss or in the alternative for

summary judgment, the motion is denied.[13] In addition, the congressional defendants' motion for a protective order is denied.

A separate Order will be entered to effectuate the rulings of this opinion.

EDWARD S. NORTHROP,
Chief United States District Judge.

Dated: NOVEMBER 14, 1980.

In the United States District Court for the District of Maryland

Civil Acion No. N–79–2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., AND MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON AND MARGARET OSMER

ORDER

In accordance with the aforegoing opinion it is this 14th day of November, 1980, ORDERED as follows:

1. That, to the extent that the congressional defendants, Mrs. Isaac (Betty) Hamburger, Miss Kathleen T. Gardner, Mrs. Lillian M. Teitelbaum and David L. Holton, have asserted absolute immunity as a basis for their motion to dismiss or in the alternative for sum-

[13] As previously stated, the Court will address the balance of defendants' contentions in support of their motion to dismiss, or alternatively for summary judgment, at a later proceeding.

mary judgment, the said motion BE, and the same hereby IS, DENIED.

2. That the motion for protective order filed by the said congressional defendants BE, and the same hereby IS, DENIED.

EDWARD S. NORTHROP,
Chief United States District Judge.

APPENDIX C

In the United States District Court for the District of Maryland

Civil Action No. X-79-2386

GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., AND MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON AND MARGARET OSMER

MEMORANDUM

Plaintiff, George H. Benford, instituted this action against American Broadcasting Companies, Inc. (hereinafter "ABC"), Margaret Osmer, an ABC employee, and members of an investigatory team of the Select Committee on Aging, United States House of Representatives (hereinafter the "congressional defendants"). The case arose from the Select Committee's investigation of the sale of supplemental health insurance policies to the elderly.

On November 3, 1978, the congressional defendants, posing as prospective purchasers, met with plaintiff. At this supposed sales meeting, plaintiff made his standard cancer insurance presentation. Without

plaintiff's knowledge or consent, the meeting was surreptitiously taped by ABC. On November 28 and 29, 1978, portions of the taped meeting were broadcast on the ABC Nightly News. Plaintiff then filed the instant action alleging six causes of action. The action, originally filed in Circuit Court for Baltimore County, was removed to this Court upon a petition for removal filed on December 27, 1979.

In an Opinion and Order filed on November 14, 1980, this Court partially denied the congressional defendants' motion to dismiss or in the alternative for summary judgment. That decision addressed only the question of legislative immunity. The Court determined that the congressional defendants were not absolutely immune under either the Speech or Debate Clause or the doctrine of official immunity.

By its subsequent Opinion and Order filed on November 24, 1980, this Court dismissed Count II of the amended complaint as to defendants ABC and Margaret Osmer. In Count II, plaintiff alleged that the taping of the sales meeting constituted an unlawful search and seizure in violation of the fourth amendment. This Court held that because one of the parties consented to the taping, there was no fourth amendment violation.

On November 25, 1980, the congressional defendants filed separate motions relating to these decisions. Based on the November 24 opinion, the congressional defendants submitted a renewed motion to dismiss Count II of the amended complaint. In addition, they

filed a motion to reconsider the Opinion and Order filed on November 14.[1]

I.

RENEWED MOTION TO DISMISS COUNT II ON THE AMENDED COMPLAINT

On November 24, 1980, this Court dismissed Count II of the amended complaint as to both ABC and Margaret Osmer, holding that because one of the parties consented to the taped conversation there was no viable fourth amendment claim. *See United States* v. *White,* 401 U.S. 745, 749–54 (1971); *United States* v. *Craig,* 573 F.2d 835, 860–61 (7th Cir. 1977); *United States* v. *Dowdy,* 479 F.2d 213, 229 (4th Cir.), *cert. denied,* 414 U.S. 823 (1973). Because the fourth amendment allegations are identical with respect to both ABC and the congressional defendants, this Court believes that the November 24 ruling is equally applicable to the congressional defendants.

Accordingly, for the reasons stated in the Opinion and Order of November 24, 1980, the congressional defendants' renewed motion to dismiss Count II of the amended complaint is granted.

II.

MOTION TO RECONSIDER

On November 14, 1980, this Court entered an Opinion and Order in which it held that the congres-

[1] On December 10, 1980, plaintiff filed a Memorandum in Opposition to the congressional defendants' motion to reconsider. Plaintiff has apparently elected, however, not to file an opposition to the renewed motion to dismiss Count II.

sional defendants were not absolutely immune under either the Speech or Debate Clause or the doctrine of official immunity. In this decision, this Court divided its analysis into two parts. The Court held that neither the congressional defendants' actions regarding the taping of the November 3 sales meeting, nor their conduct with respect to the broadcasting, was absolutely protected. The Court believed that this dichotomy was necessary because a number of counts of the amended complaint pertained exclusively to taping, while others dealt with the public dissemination of the taped conversation as well.

The congressional defendants have now asked this Court to reconsider its decision with respect to their claim of absolute immunity. The congressional defendants' primary contention is that by limiting the analysis to the actions surrounding the taping and broadcasting, the Court has failed to consider the investigatory activity preceding the November 3, 1978, meeting. In addition, defendants claim that the Court has read the "illegality" exception to the Speech or Debate Clause too broadly. This Court is not persuaded by either argument.

The congressional defendants insist that the arrangements made prior to the sales meeting must be distinguished from the meeting itself. It is fair to infer that the congressional defendants knew that the meeting was to be taped and that what they claim to be legitimate investigative activity was done with an eye toward the sales meeting. The many acts that the

congressional defendants claim must be separately considered were allegedly part of a scheme that culminated with the meeting of November 3. The Court's judgment is unchanged that the preparatory conduct must be considered in conjunction with the taped meeting.

In so deciding, this Court does not intend to suggest that legislative investigations are unprotected. It merely asserts that legislative officials who engage in allegedly illegal conduct while gathering information are not absolutely immune.

The congressional defendants also claim that the "illegality" exception was improperly applied in this case. They contend that if this exception exists at all, it is only applicable to allegedly unconstitutional conduct. This Court does not believe, however, that this exception is deserving of such a narrow interpretation. In considering the cases in which this exception was applied, the Supreme Court in *Gravel* v. *United States*, 408 U.S. 606 (1971), explained, "The three cases reflect a decidedly jaundiced view towards extending the [Speech or Debate] Clause so as to privilege *illegal* or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Id.* at 620 (emphasis added) (referring to *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), *Dombrowski* v. *Castland*, 387 U.S. 82 (1967), and *Powell* v. *McCormack*, 395 U.S. 486 (1969)). Despite the constitutionality of the conduct at issue, this Court does not believe that

Speech or Debate Clause protection extends to legislative aides whose investigatory activities allegedly constitute a violation of state and federal statutes.

For the above reasons, and for the reasons fully set out in this Court's Opinion and Order of November 14, 1980, the motion of the congressional defendants to reconsider that decision is denied.

A separate Order will be entered to effectuate these rulings.

EDWARD S. NORTHROP,
Chief United States District Judge.

Dated: JANUARY 14, 1981.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND
Civil Action No. N-79-2386
GEORGE H. BENFORD

v.

AMERICAN BROADCASTING COMPANIES, INC., AND MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON AND MARGARET OSMER

ORDER

For the reasons set out in the foregoing Memorandum, IT IS, this 14th day of January, 1981, ORDERED as follows:

1. That the congressional defendants' renewed motion to dismiss Count II of the amended complaint BE, and the same hereby IS, GRANTED;

2. That the congressional defendants' motion to reconsider the Opinion and Order filed on November 14, 1980, BE, and the same hereby is, DENIED; and,

3. That the Clerk is directed to mail copies of this Order and the foregoing Memorandum to counsel of record for the parties.

EDWARD S. NORTHROP,
Chief United States District Judge.

APPENDIX D

In the United States District Court for the District of Maryland

Civil Action No. N-79-2386

GEORGE H. BENFORD, PLAINTIFF

v.

AMERICAN BROADCASTING COMPANIES, INC. AND MRS. ISAAC (BETTY) HAMBURGER AND MISS KATHLEEN T. GARDNER AND MRS. LILLIAN M. TEITELBAUM AND DAVID L. HOLTON AND MRS. MARGARET OSMER, DEFENDANTS

AMENDED COMPLAINT

George H. Benford, of Anne Arundel County, Maryland, Plaintiff, by Wilson K. Barnes and Dean E. Sharp, his attorneys, sues American Broadcasting Companies, Inc., a corporation of the State of New York doing business in the State of Maryland, Mrs. Isaac (Betty) Hamburger, Miss Kathleen Gardner, Mrs. Lillian M. Teitelbaum, David L. Holton and Mrs. Margaret Osmer, Defendants.

COUNT I

(Tort, violation of Maryland Code C & J Section 10-401 et seq., Act of 1977, Ch. 692)

1. FOR THAT the Plaintiff, George H. Benford (Benford) since 1965 has been and now is an Inde-

pendent Agent to sell policies of cancer insurance, and other insurance, of the American Family Life Assurance Company of Columbus, Georgia, a Georgia corporation, duly licensed to do business in the State of Maryland (American Family), and since 1971 has been State Manager for Maryland for American Family and has been, and now is, actively and has been successfully engaged in his work in selling such insurance and acting as such State Manager. It is an important part of Benford's duties as such State Manager to recruit and train other independent agents to sell such insurance for American Family.

2. On October 20, 1978, the Defendant Kathleen T. Gardner (Gardner) came to Benford's office and stated that she desired a career in selling insurance and that American Family had been recommended to her by her sister. Benford explained to Gardner the American Family Cancer Care Program, gave Gardner relevant material to read and indicated that if she was still interested, to return to see him. She did so return and completed an application for a temporary Maryland insurance license and Associates Agreement. On October 24, 1978, Gardner completed the American Family form entitled Personal History Information in which she indicated that her past employment had been as a newswriter for the National Association of Home Health Association, 426 C Street N.E., Washington, D.C. 20007, which terminated in August, 1978 so that she could write independently. At the time Benford had no reason to doubt the accuracy of this statement of Gardner, but, unknown to

Benford, in fact, the statement was false and Gardner was employed as an Investigator by the Select Committee on Aging of the House of Representatives of the United States of the 90th Congress (Select Committee). Thereafter, on October 31 and November 1, 1978, Gardner telephoned Benford that a gentleman friend of hers knew two ladies who were presidents of two senior citizen groups who were interested in hearing about the American Family Cancer Policy, and requested Benford to accompany her to a meeting with the prospective insureds in that she did not believe that she was confident enough to handle the meeting by herself. Benford agreed to accompany Gardner to the contemplated meeting and Gardner made an appointment for 1:00 p.m. (later extended to 1:30 p.m.) on Friday, November 3, 1978 at the home of the Defendant Mrs. Isaac (Betty) Hamburger at 101 Brightside Avenue in Pikesville, Baltimore County, Maryland (Hamburger). When Gardner and Benford arrived at the meeting, they were greeted by Hamburger who introduced them to the Defendant Lillian M. Teitlebaum, Silver Spring, Montgomery County, Maryland (Teitelbaum) who stated that she was president of her senior citizen group in Silver Spring. Hamburger stated that Hamburger was an officer in her senior citizen group in Pikesville. The Defendant David L. Holton (Holton) introduced himself as a friend of Gardner's who had recommended Hamburger and Teitelbaum for the interviews. Benford presented his standard cancer care presentation and there were a number of questions, answers and

various statements made at the meeting which lasted for approximately one and one-half hours. At the conclusion of the meeting, Teitelbaum stated that she would take a Cancer Care Policy of American Family for six months, Holton stating that she should take it. Benford then stated to Teitelbaum that after she received the policy, if it were not all that he had stated it to be, she could return the policy to the American Family and it would refund the entire premium to her. Teitelbaum appeared to be satisfied with this and paid Gardner in cash the semi-annual premium of $23.50, an Association Rate, Teitelbaum having stated that he was a member of the American Association for Retired People—members of which are entitled to the Association Rate. Gardner gave Teitelbaum a receipt for the cash premium received. Gardner stated at the end of the meeting that she would be in touch with Hamburger and Teitelbaum in regard to their respective senior citizens' associations. Gardner stated to Benford that she would come in to the office the following Monday, November 6, 1978, to complete the transmittal form for the policy purchased by Teitelbaum. On November 6, 1978, however, Gardner telephoned that she had an aunt in Atlanta, Georgia, that was ill and she was going to Atlanta to be with her, but would mail the Teitelbaum application and telephone Benford upon her return from Atlanta. The Teitelbaum application was received by Benford in the mail and transmitted by him to the home office of American Family. Gardner was entitled to a commission of $13.00 for the sale of the American

Family policy to Teitelbaum, but the American Family check for that amount to Gardner has not yet cleared the bank. Gardner telephoned Benford the following week and stated that she had returned from Atlanta but for personal reasons she was resigning as an American Family agent.

3. Unknown to Benford and without his consent, the meeting of November 3, 1978 at the home of Hamburger as subjected to electronic surveillance and was taped and filmed by the Defendant American Broadcasting Companies, Inc., its agents, servants and employees, (ABC). Benford first learned of this electronic surveillance, unlawful taping and filming, when on Tuesday, November 28, 1978, portions of the tape and film were broadcasted on ABC News, taken out of context, together with various false statements in regard to the insurance coverage involved in regard to Benford and in regard to American Family. Benford's picture appeared on the broadcast. After the above-mentioned broadcast, Benford learned for the first time that David L. Holton was the Chief Investigator of the Select Committee, and that Hamburger and Teitelbaum were acting as Investigators for the Select Committee.

4. The electronic surveillance, taping and filming of the above-mentioned meeting and interview of November 3, 1978, and the broadcasting of portions thereof by ABC without the knowledge or prior (or any) consent of Benford, were violations by the Defendants of the provisions of the Act of the General Assembly of Maryland of 1977, Chapter 692, as

amended by the Act of the General Assembly of Maryland of 1978, Chapter 29 (the Act), codified as Maryland Code, Courts and Judicial Proceedings, Chapter 4, Wiretapping and Electronic Surveillance, Sections 10–401 to 10–412, 1979 Cumulative Supplement, pages 174–186. The Act became effective on July 1, 1977, well before the unlawful electronic surveillance, taping and filming of the meeting and interview of November 3, 1978 and thereafter was known to the Defendants to be in full force and effect, and was knowingly, deliberately, wantonly and maliciously violated by the Defendants without regard to the grievous injury inflicted thereby upon the Plaintiff Benford.

By virtue of Section 10–402 of the Act, it is provided:

> (a) *Unlawful acts.*—Except as otherwise specifically provided in this subtitle it is unlawful for any person to:
>
> (1) Wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> (2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subtitle; or
>
> (3) Wilfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know

> that the information was obtained through the interception of a wire or oral communication in violation of this subtitle.
>
> (b) *Penalty.* Any person who violates subsection (a) of this section is guilty of a felony and is subject to imprisonment for not more than five years or a fine of not more than $10,000, or both.

The acts done by the Defendants do not fall within any exceptions to the application of the Act.

Section 10–410 of the Act provides:

> (a) Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications, and be entitled to recover from any person:
>
> (1) Actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1,000, whichever is higher;
>
> (2) punitive damages; and
>
> (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

Wherefore, this action is brought and the Plaintiff claims Two Hundred Thousand Dollars ($200,000.00) as *compensatory damages* and Four Million Dollars ($4,000,000.00) as *punitive damages* against the Defendants, jointly and severally, together with reasonable counsel fees and costs.

COUNT II

(Tort, Damages under the Fourth and Fourteenth Amendments to the Constitution of the United States)

5. AND FOR THAT, the Defendants made the unlawful electronic surveillance, tapes and films and used them under the circumstances set forth in Count I of this Amended Complaint and performed the unlawful acts knowingly, wantonly, deliberately and maliciously, with indifference to the damages resulting therefrom to the Plaintiff and the Plaintiff suffered substantial damages resulting from such unlawful acts as set forth in Count I of the Amended Complaint, the averments of which Count I are hereby specifically adopted and made a part of this Count II as if set forth at length herein; and for that the Fourth Amendment to the Constitution of the United States provides in relevant part, as follows:

> The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures shall not be violated, . . .

and for that the above-mentioned provisions of the Fourth Amendment to the Constitution of the United States have been held by authoritative judicial decisions to be applicable to the several States, including the State of Maryland, and to its citizens by virtue of the provisions of the Fourteenth Amendment to the Constitution of the United States; and for that the unlawful electronic surveillance, and the making of the tapes and films without the knowledge and consent of the Plaintiff were and are a violation of the above-mentioned provisions of the Fourth Amendment entitling the Plaintiff to damages, both compensatory and punitive.

Wherefore, this action is brought and the Plaintiff claims Two Hundred Thousand Dollars ($200,000.00) as *compensatory damages* and Four Million Dollars ($4,000,000.00) as *punitive damages* against the Defendants, jointly and severally, together with reasonable counsel fees and costs.

COUNT III

(Tort, Civil Conspiracy)

6. And for that, the Defendants made the unlawful electronic surveillance, tapes and films and used them under the circumstances set forth in Count I of this Amended Complaint and performed the unlawful acts knowingly, wantonly, deliberately and maliciously, with indifference to the grievous damages resulting therefrom to the Plaintiff and the Plaintiff suffered substantial damages resulting from such unlawful acts as set forth in Count I of the Amended Complaint, the averments of which Count I are hereby specifically adopted and made a part of this Count III as if set forth at length herein; and for that the Defendants wrongfully conspired, confederated and agreed together to devise and carry out a scheme or plan whereby the Act was knowingly violated and the Plaintiff was subjected to an unlawful electronic surveillance and his words were unlawfully recorded upon tapes and his likeness was unlawfully recorded upon film, all without his knowledge or consent, with the design and plan to use the results of such unlawful electronic surveillance, and such tapes and films upon a nationwide broadcast by Defendant ABC over

ABC News on the evenings of November 28 and 29, 1978 and in so using them as aforesaid, all to the direct economic and financial advantage to the Defendant ABC and to the resulting great injury to the Plaintiff; that in furtherance of this civil conspiracy and in implementation and consummation thereof, the Defendants and other persons did and performed the following overt acts, e.g.:

a. Gardner and Holton and other members of the staff of the Select Committee agreed to seek to have Gardner falsely pretend to Benford to become an Independent Agent for American Family with a view of conducting an illegal and clandestine meeting employing unlawful electronic surveillance, taping and filming.

b. Gardner made a false statement in her application to become an Independent Agent of American Family in regard to her present employment in order to conceal from Benford that she was employed by the Select Committee.

c. Gardner made a false statement in her application for a temporary Maryland insurance license and obtained such a 90-day temporary license for the same purpose of concealment.

d. Gardner falsely represented to Benford that she was vitally interested in becoming an Independent Agent of American Family when in fact she was merely establishing herself to investigate the operation of Benford for the Select Committee, unknown to Benford and by the use of unlawful means, and when

this was accomplished, Gardner forwith resigned as an Independent Agent for American Family.

e. Hamburger, Teitelbaum and Gardner agreed that they, Holton and ABC, its agents, servants and employees, would conduct a secret and unlawful electronic surveillance, taping and filming of an interview with Benford.

f. Hamburger permitted her home to be used as the site of the unlawful surveillance on November 3, 1978 and held herself out to Benford as a prospective purchaser of the Cancer Care insurance, not disclosing her relationship to the Select Committee.

g. Teitelbaum subscribed to a Cancer Plan Policy of American Family for one-half of a year and paid the premium therefor to Gardner with no intention of continuing the policy, with the purpose of falsely indicating that the meeting of November 3, 1978 was a bona fide one and not in fact for the purpose of an illegal surveillance without Benford's knowledge or consent.

h. Gardner, Hamburger, Teitelbaum and Holton conducted a clandestine meeting on November 3, 1978 as an apparently bona fide meeting to study and avail Hamburger and Teitelbaum of Cancer Care insurance coverage, whereas, in fact, it was for an unlawful surveillance to obtain information for the Select Committee, all without the knowledge or consent of Benford.

i. Gardner forwarded to Benford the Teitelbaum one-half of a year application, but has not yet cashed her commission check for the Teitelbaum policy.

j. Gardner telephoned Benford indicating that for "personal reasons" she would not continue as an Independent Agent for American Family, whereas, in fact, she was terminating because of her contemplated report to the Select Committee, her employer, on November 28, 1978.

k. Gardner presented knowingly false and misleading statements before the Select Committee on November 28, 1978.

l. ABC, its agents, servants and employees, prepared and used its electronic equipment, and its taping and filming equipment to record, clandestinely and illegally, the meeting of November 3, 1978, without the knowledge or consent of Benford, for the purpose of unlawfully presenting portions of such recordings over the ABC News at a later date.

m. ABC, its agents, servants and employees, subsequent to the meeting of November 3, 1978, edited and prepared for use by ABC, its agents, servants and employees the tapes and films obtained by the unlawful surveillance on November 3, 1978 for subsequent broadcasting over ABC News.

n. ABC, its agents, servants and employees, including Frank Reynolds and the Defendant Margaret Osmer (Osmer), put on the ABC News over national hook-up, on November 28, 1978 portions of the unlawful electronic surveillance, taping and filming of the meeting of November 3, 1978 in which the picture of Benford appeared, Osmer stating, in part: "ABC News' hidden cameras watched as this insurance agent from American Family gave his sales pitch to two

ladies over 70," referring to Benford whose picture appeared on the tape of the broadcast and to Hamburger and Teitelbaum as the ladies over 70, all indicating that ABC, its agents, servants and employees knew that the meeting of November 3, 1978 was clandestine and unlawful.

7. That the above-mentioned civil conspiracy was entered into and implemented by the Defendants and other persons, with malice and with wanton, reckless and complete indifference to the grave financial and other injury to Benford and his well-established good reputation as an Independent Agent for the sale of cancer and other insurance for American Family and as the State Manager for Maryland for American Family and with a reckless, wanton and complete disregard for the rights of the Plaintiff Benford, which entitle the Plaintiff to punitive as well as to compensatory damages.

Wherefore, this action is brought and the Plaintiff claims Two Hundred Thousand Dollars ($200,000.00) as *compensatory damages* and Four Million Dollars ($4,000,000.00) as *punitive damages* against the Defendants, jointly and severally, together with reasonable counsel fees and costs.

COUNT IV

(Tort, violation of the Federal Eavesdropping Statute, 18 U.S.C. Sections 2510 et seq., as amended)

8. And for that, Defendants subjected Benford to an unlawful electronic surveillance and his words were unlawfully recorded upon tapes and his likeness was

unlawfully recorded upon film, all without his knowledge or consent, or any expectation on his part that his communications were being intercepted through the use of electronic devices, with the design and plan to use the results of such unlawful electronic surveillance and such tapes and films upon a nationwide broadcast by Defendant American Broadcasting Companies, Inc. over ABC News on the evenings of November 28 and 29, 1978, as set forth in COUNTS I, II and III of this Amended Complaint, the averments of which COUNTS are hereby specifically adopted and made a part of this COUNT IV as if set forth at length herein; and said unlawful aural acquisition of Benford's communications was designed, planned and done for the purpose of committing injurious act to Benford, and as part of Defendants' designed course of action, Defendant ABC broadcasted nationwide over ABC News on the evenings of November 28 and 29, 1978 Benford's unlawfully recorded words, completely out of context, and his picture, together with various deliberate erroneous statements concerning the insurance coverage involved in regard to Benford and American Family, and, therefore, Defendants knowingly, deliberately and maliciously defamed Benford, invaded his right of privacy, and interfered with his insurance business and occupation as an independent insurance agent-State Manager, and in so using the product of the unlawful electronic surveillance as aforesaid, all to the direct economic and financial advantage of Defendant ABC and to the resulting great injury to Benford, Defendants knowingly, deliberately, willfully

and maliciously violated the Federal Eavesdropping Statute, 18 U.S.C. Section 2510 et. seq., as amended, and the acts done by the Defendants do not fall within any exceptions to the application of said Federal Statute.

Wherefore, this action is brought and the Plaintiff claims Two Hundred Thousand Dollars ($200,000.00) as *compensatory damages* and Four Million Dollars ($4,000,000.00) as *punitive damages* against the Defendants, jointly and severally, together with reasonable counsel fees and costs.

COUNT V

(Tort, Malicious Interference with Business Relations)

9. And for that, Defendants willfully, wantonly, maliciously, and without cause or justification, interfered with Benford's right to pursue a lawful insurance business as an independent Agent and State Manager for American Family by infiltrating Benford's insurance agency and by carrying into effect a designed and contrived scheme to conduct an unlawful electronic surveillance, taping and filming of Benford, and by using the results of such unlawful electronic surveillance, taping and filming upon a nationwide broadcast by Defendant ABC over ABC News on the evenings of November 28 and 29, 1978, as set forth in COUNTS I through IV of this Amended Complaint, the averments of which COUNTS are hereby specifically adopted and made a part of this COUNT V as if set forth at length herein.

10. Defendants well knew and intended that the acts and interferences above alleged would cause, and Defendants actually did thereby cause, Benford great damage to his insurance sales and agent recruitment programs by causing adverse publicity concerning Benford and his insurance business, methods and practices, with consequent injury to his reputation and prestige, and thereby causing insurance customers, agents and others not to enter into or continue their business relations with him, and by reason of the foregoing, Benford has been subjected to great expense and annoyance in his endeavors to protect himself and his insurance business against the aforesaid malicious acts and interferences, all to his great damage.

Wherefore, this action is brought and the Plaintiff claims Two Hundred Thousand Dollars ($200,000.00) as *compensatory damages* and Four Million Dollars ($4,000,000.00) as *punitive damages* against the Defendants, jointly and severally, together with reasonable counsel fees and costs.

COUNT VI

(Tort, Invasion of Privacy)

11. And for that, Defendants willfully, wantonly, maliciously, and without cause or justification, invaded Benford's right of privacy by conducting an unlawful electronic surveillance, taping and recording of his likeness on film, and by using the results of such unlawful electronic surveillance, taping and recording of his likeness on film upon a nationwide broadcast by Defendant ABC over ABC News on

the evenings of November 28 and 29, 1978, as set forth in Counts I through V of this Amended Complaint, the averments of which Counts are hereby specifically adopted and made a part of this Count VI as if set forth at length herein.

12. The use of Benford's words and picture as aforesaid was without his knowledge or consent and constitutes a violation of Benford's right of privacy as recognized by the laws of the State of Maryland, and by reason of such nationwide publication, Benford was held up to public ridicule and his privacy was invaded and he was humiliated and made to suffer embarrassment, all to Benford's great damage.

13. That the aforesaid acts of Defendant ABC were for the purpose of exploiting the business of the Defendant ABC and for the purpose of increasing its gains and profits and as a method of attracting widespread public attention and audience to its ABC News program, and improving its TV ratings, all to the direct economic and financial advantage of the Defendant ABC and to the resulting great injury to Benford.

Wherefore, this action is brought and the Plaintiff claims Two Hundred Thousand Dollars ($200,000.00) as *compensatory damages* and Four Million Dollars ($4,000,000.00) as *punitive damages* against the Defendants, jointly and severally, together with reasonable counsel fees and costs.

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Opposition

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No. 81-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID L. HOLTON, CHIEF INVESTIGATOR,
SELECT COMMITTEE ON AGING,
U.S. HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners

v.

GEORGE H. BENFORD,
Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a motion for summary dismissal on Speech or Debate Clause grounds of a claim that Congressional aides joined in a conspiracy surreptitiously and unlawfully to video-tape and televise a private "sales" meeting may be denied absent evidence separating the aides' participation in the conspiracy from their conduct as Congressional investigators.

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GEORGE H. BENFORD,
Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Constitutional and Statutory Provisions set out in the Petition (Pet. pp. 2-3), respondent relies upon provisions of the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. §§ 10-401, 10-402 and the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2520, *et seq.*, set out in the Appendix, *infra*, pp. 1a-3a.

COUNTERSTATEMENT OF THE CASE

A. The Facts and the Proceedings in the District Court

Sometime prior to November 3, 1978, petitioners joined with defendants American Broadcasting Corporation

("ABC") and its employee, Margaret Osmer, to carry out an agreed upon conspiracy and plan surreptitiously and unlawfully to video tape and subsequently to have ABC televise a meeting among respondent, an independent insurance agent, petitioners Teitelbaum and Hamburger, posing as insurance "prospects" and petitioner Gardner, posing as a nascent trainee agent. (Pet. 42a-43a, 48a, 50a-51a, 53a). In this meeting, held at Hamburger's Pikesville, Maryland home, respondent sought to assist Gardner to sell health insurance to Teitelbaum and Hamburger. Respondent was unaware that the two supposed "prospects" were "volunteer investigators" and that Gardner was a paid employee of the House Select Committee on Aging (the "Select Committee"). (Holton Affidavit, para. 7, Exhibit M to Defendant's Motion to Dismiss). Petitioner Holton, who joined in the scheme posing as Gardner's "friend", was Chief Investigator of the Select Committee. (Pet. 7a, 8a, 40a; Holton Affidavit, *supra*).[1] Pursuant to the conspiracy, on November 28 and 29 ABC televised excerpts from the tape and made false statements concerning the insurance coverage respondent was helping Gardner to "sell". (Pet. 8a; 51a).

After respondent learned about the broadcast, he instituted suit in state court. Defendants then removed the case to the United States District Court for the District of Maryland. In respondent's amended complaint, he alleged that the defendants' actions violated two criminal statutes, the Maryland Wiretapping and Electronic Surveillance Act (Pet. 8a; 43a-44a) and the Federal Eavesdropping Statute, 18 U.S.C. Sections 2510 *et seq.* (Pet. 50a-52a. He further alleged that defendants had committed the common law torts of civil conspiracy, malicious interference with business relations, and invasion

[1] References preceding a semi-colon are to the findings of the courts below; references following the semi-colon are to the complaint and to other materials in the record before the lower courts.

of privacy (Pet. 8a; 46a, 50a, 51a-52a, 53a, 54a). These crimes and torts injured plaintiff, the complaint alleged.

Before respondent had engaged in any discovery, petitioners filed a motion to dismiss the proceeding *inter alia*, on the ground that the Constitution's Speech or Debate Clause (Pet. 2) immunized them from suit. They also sought a stay of all discovery. In support of their motion, petitioners offered no evidence concerning their role in the plan surreptitiously to tape and have ABC broadcast a distorted version of the November 3, 1978 meeting. Instead, they submitted documents tending to show that the House of Representatives had authorized the Select Committee (a non-legislative, investigatory body) to study the problems of older Americans, and that its Chairman had issued a public statement to a newspaper pledging to investigate sales techniques insurance companies used to sell health insurance policies. Exhibit L to the Motion, Par. 3, 4 (Pepper Affidavit). The Committee Chairman instructed the Staff to plan and initiate the investigation which he "supervised". *Id.*, Par. 4. Petitioner Holton also stated on affidavit that Staff members surreptitiously infiltrated several insurance organizations and incorporated the "data" thus obtained in a Committee publication, "A Staff Study" titled "Abuses in the Sale of Health Insurance to the Elderly In Supplementation of Medicare: A National Scandal". (Holton Affidavit, Paras. 8, 10).

None of the documents presented below showed that any Congressman had authorized petitioners to conspire deceitfully and surreptitiously to have staged transactions with insurance agents video taped and televised let alone to violate state and federal criminal laws or to commit civil wrongs in doing so. On the contrary, the Select Committee Chairman averred that prior to releasing the Staff Study he asked the Committee's General Counsel to conduct an "independent investigation to make sure

we were not jeopardizing anyone's rights or in violation of any State or Federal statutes." Pepper Affidavit, Par. 4. The record does not show whether counsel reviewed the transactions in suit. The Staff Study was dated (but not released) on November 28, 1978, the date of ABC's first broadcast.

B. The Decisions Below

1. *The District Court*

The district court ruled only upon petitioner's claim of absolute legislative privilege (Pet. 9a). Relying upon *Gravel* v. *United States*, 408 U.S. 606 (1972), *Doe* v. *McMillan*, 412 U.S. 306 (1973), and *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), the district court held that this Court has been "reluctant" to extend the Speech or Debate clause to the private publication of materials obtained in the course of "legitimate" legislative activity. (Pet. 14a-15a). See also *id.* at 15a, *following McSurely* v. *McClellan*, 553 F.2d 1277, 1285 (D.C. Cir. 1976), *cert. dismissed as improvidently granted*, 438 U.S. 189 (1978). Hence, the district court held, the broadcast was not "an integral part of the deliberative and legislative process of" the Select Committee. (Pet. 17a). It further held that the taping of the November 3, 1978 meeting was not protected because ". . . the employment of unlawful or unconstitutional methods of investigative inquiry is 'no part of the legislative process or function; it is not a legislative act.' " (Pet. 21a, quoting from *McSurley* v. *McClellan*, *supra*, 553 F.2d at 1288 and *United States* v. *Brewster*, 408 U.S. 501, 526 (1972)). The court went on to hold that the broadcasting and taping might be subject to a qualified, official immunity ". . . to the extent authorized . . .", a question it left for further proceedings. (Pet. 28a).

Defendants then moved for reconsideration, arguing, *inter alia*, that the district court had misconstrued the complaint and had therefore failed to find that their ac-

tions preceding the meeting were absolutely privileged. Responding, plaintiff stated his position unequivocally: "all of the acts and conduct of the Congressional Employee Defendants alleged in the complaint were . . . an integral part of the surreptitious taping in concert with ABC and Margaret Osmer, and the subsequent broadcasts." Those acts ". . . were part of a well-planned, contrived scheme carried out with Defendants ABC and Margaret Osmer." Plaintiff's Memorandum, etc. In Opposition To The Motion Of The Congressional Employee Defendants Requesting The Court To Reconsider Its Decision and Order Filed November 14, 1980, pp. 1-2 (hereinafter Plaintiff's Reconsideration Memo). Petitioners offered no matter cognizable on a motion for summary judgment rebutting that claim. See Fed. R. Civ. Proc. Rule 56(c), (e)). Upon reconsideration, the district court found that petitioners knew the meeting was to be taped and that the "many acts" that preceded it were ". . . done with an eye toward . . ." that meeting (Pet. 34a-35a). Hence, the court found, ". . . the preparatory conduct must be considered in conjunction with the taped meeting." (Pet. 35a). Accordingly, the court adhered to its prior decision, noting that "The many acts that defendants claim must be separately considered were allegedly part of a scheme that culminated with the meeting of November 3." (Pet. 35a). Subsequently, the district court substantially granted petitioner's motion for a stay of all discovery proceedings against them (4a, *infra*).

2. *The Court of Appeals*

Petitioners promptly appealed from the district court's refusal to accord them absolute immunity.[2] The court

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[2] The court of appeals held that an order denying a motion to dismiss based upon the Speech or Debate Clause is appealable. (Pet. 2a-3a). That ruling ineluctably demonstrates the court of appeals' understanding that the Speech or Debate clause, if applicable, precludes questioning, not just liability. Compare Pet. 20 with Pet. 2a, *citing Helstoski* v. *Meanor*, 442 U.S. 500 (1979). See *id.* at 508.

of appeals held in a *per curiam* opinion that "at this point in the proceedings" the record did not sufficiently establish that the aides' involvement with ABC in the taping of the meeting was a "legislative act" so as to warrant summary judgment. (Pet. 3a). The court noted that defendant aides might obtain summary judgment or prevail at trial if they adduced facts showing that their involvement was "protected legislative activity". Compare Pet. 20, Heading E. With that, the court of appeals affirmed, ". . . for reasons adequately stated in the opinion of the district court." (Pet. 3a, footnote omitted).

REASONS FOR DENYING THE WRIT

A. The Court Below Correctly Followed the Decisions of This Court

The court below correctly followed the decisions of this Court. This Court has repeatedly held that dissemination outside the halls of Congress of material obtained upon investigation by a legislator, let alone by a legislative aide, is not privileged conduct immunized by the Speech or Debate Clause. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 132-133 (1979) ("electronic media"); *Doe* v. *McMillan*, 412 U.S. 306, 315-317 (1975) (Committee Report). See *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *Gravel* v. *United States*, 408 U.S. 606 (1972). This Court has also made clear that criminal conduct by a legislative aide outside the halls of Congress, such as that arguably at issue here, is not within Speech or Debate Clause protection even if it occurs in a context related to legislative acts. *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 84 (Congressional investigation); *Gravel* v. *United States*, *supra*, 408 U.S. at 619-622; *Doe* v. *McMillan*, 412 U.S. 306, 315 (1973) (dictum); *McSurely* v. *McClellan*, *supra*, 553 F.2d at 1287.

Petitioners' assertion (Pet. 15-18) that the decision below conflicts with this Court's prior ruling because cer-

tain allegations of the complaint refer to the Congressional investigation petitioners were conducting reflects a misreading of the lower court's decision and a misunderstanding of the rules governing summary judgment. The court below affirmed the district court's refusal to dismiss the complaint ". . . at this point in the proceedings . . ." on narrow grounds. It held only that the record did ". . . not establish with sufficient strength to justify *summary disposition* that the Congressional defendants' involvement in the taping of the meeting by ABC was a legislative act." (Pet. 3a, emphasis added).

That determination fits comfortably within the ambit of settled rules governing summary adjudication. Count III of the Complaint alleged a conspiracy among all the defendants to carry out a scheme to subject plaintiff to an unlawful surveillance. (Pet. 46a). The district court found that the acts petitioners claimed should be considered separately (the deceptive infiltration of respondent's business, the arrangements for the November 3rd meeting, the meeting itself, and the charade in which petitioners engaged) were part of the unlawful conspiracy. (Pet. 21a, 34-35a). None of the affidavits and other materials submitted in support of petitioner's motion contained *any* facts about petitioners' role in arranging for the taping and broadcast of the November 3rd meeting.[3]

Having failed *factually* to separate their role in the alleged conspiracy from legitimate legislative acts, petitioners were not entitled to summary judgment based upon allegations in the complaint. It is settled that on a motion for summary judgment, " . . . the papers supporting movant's positions are closely scrutinized while the opposing papers are indulgently treated. . .". 6 Moore, Fed. Prac. Par. 56.15[3] (2d Ed. 1981), citing *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970),

[3] Respondent was not able to conduct any discovery prior to the disposition of the motion for summary judgment.

Bishop v. *Wood*, 426 U.S. 341 (1976) and *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). "The Federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41 (1957).

Petitioners failed to present materials cognizable on a motion for summary judgment showing that they did not conspire with ABC and Osmer unlawfully to set up a meeting so ABC could surreptitiously tape and televise it or that some or all of their conduct was unrelated to the conspiracy. As the district court found, that failure, read in light of respondent's allegations, gives rise to an inference that the "preparatory conduct" and taping petitioners claim are protected by the Speech or Debate Clause were engaged in for publicity, not to obtain information, and were inextricably intertwined with the unlawful conspiracy. (Pet. 34a-35a). See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 158-159 (1970) (Harlan, J.) (sustaining adverse inference from movant's failure to present evidence); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962) (inferences to be drawn from materials supporting summary judgment must be viewed in light most favorable to opposing party). That adverse inference is buttressed by the "coincidence" that the dates of the first broadcast and Staff Report were identical. On summary judgment, of course, the district court was not obliged to confine itself to the bare bones of the complaint, See Fed. R. Civ. Proc. Rule 56(c), (d), (e), as petitioners apparently assume.

Nor do conclusory statements that the Chairman "supervised" the investigation or that petitioners acted "within the scope of our employment and under the continuous control of Chairman Pepper. . ." entitle them to summary judgment. (Holton Affidavit, Par. 11). *Fowler*

v. *Southern Bell Tel & Tel. Co.*, 343 F.2d 150 (5th Cir. 1965) (denying summary judgment based on conclusory affidavits to federal officers claiming immunity in illegal wiretap case). See *G. D. Searle & Co.* v. *Charles Pfizer*, 231 F.2d 316 (7th Cir. 1956) (conclusory statements do not suffice on summary judgment); *Union Ins. Soc'y. of Canton* v. *William Gluckin*, 353 F.2d 946 (2d Cir. 1965) (same).

Given the cited principles governing summary disposition, and the state of the record before the court of appeals, it correctly held ". . . at this point. . ." that the district court had discretion to proceed further. See *Dombrowski* v. *Eastland*, 387 U.S. 82, 84 (1967) (no summary judgment where record affords more than "colorable substance" to claim that legislative aide engaged in criminal conspiracy as part of investigation); 21a. The decision below, far from being novel, rests upon settled doctrine governing summary adjudication.

On the record below, the court of appeals correctly determined that *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), *United States* v. *Brewster*, 408 U.S. 501 (1972), and *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) did not compel dismissal. (Compare Pet., 15, 17). In each of those cases, involving respectively the issuance of a subpoena, voting, and conducting a legislative hearing, the Court determined, based upon the history and purposes of the privilege, that the acts in question, all unlike the ones here, done in the halls of the legislature, were legislative acts. Having reached that conclusion, this Court held in each instance that these acts and the legislators' motives for engaging in them could not be the subject of inquiry or be introduced in evidence. But deceptively arranging a meeting for the purpose of surreptitiously taping it and having it broadcast is not even arguably ". . . an integral part of the deliberative and communicative processes by which mem-

bers participate in Committee and House proceedings . . ." or ". . . an essential part of the legislative process. . ." *Hutchinson* v. *Proxmire*, *supra*, 443 U.S. at 126, 130 (emphasis omitted). Since petitioners had the burden of coming forward with facts establishing that they did not join in the alleged conspiracy to engage in unlawful conduct for publicity's sake, and since petitioners failed to sustain that burden, inquiry into petitioners' role in that conspiracy is entirely proper. No conflict between the decision below and controlling precedents here warrants *certiorari*.

B. The Decision Below Does Not Conflict With *McSurely* or *Helstoski*

The refusal of the court below to "parse the complaint" and grant "relief" from certain of its allegations does not conflict with the holding in *McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (*en banc*), *cert. dismissed as improvidently granted*, 438 U.S. 189 (1978). There, the court of appeals affirmed the lower court's holding that "plaintiff's action is not entirely foreclosed by legislative immunity." But, exercising its supervisory power, the court identified "for the District Court's guidance on remand" which allegations could be the subject of further proceedings, and which should be summarily dismissed. 553 F.2d at 1284.

Unlike this case, the *McSurely* controversy came to the *en banc* court of appeals after a long history of adjudication, including a proceeding in a Kentucky district court, an appeal to the sixth circuit, a criminal contempt proceeding arising out of a Congressional subpoena in the District of Columbia, an appeal from that proceeding to the Circuit Court, and an opinion by a panel of the court of appeals (with lengthy dissent) prior to that court's *en banc* consideration. *McSurely* v. *McClellan*, *supra*, 553 F.2d at 1282-1283; *McSurely* v. *McClellan*,

521 F.2d 1024 (D.C. Cir. 1975) (panel decision).[4] Hence, all the relevant facts were available to the court of appeals. Its detailed remand instructions following such a massive investment of judicial (and the parties') resources reflected sound judicial administration, not a rule of law, as the court's opinion makes quite clear. 553 F.2d at 1284.

This case is a far cry from *McSurely*. For here, petitioners have studiously avoided disclosing their part in the alleged conspiracy and have carefully kept from the court below all information bearing upon their claim that in staging a charade for the media, they were in fact conducting a legislative investigation. The supposed conflict with *McSurely* thus lies in the utterly different state of the record here, not in the rule of law applied.[5]

That aside, far from conflicting with *McSurely*, the district court followed it. For *McSurely* holds that the Speech or Debate Clause does not privilege ". . . the employment of unlawful means to implement an otherwise proper legislative objective . . ." in conducting an investigation. 553 F.2d at 1288. As the *McSurely* court put it, "Even though there is broad authorization for an investigation and justification for a focus on particular individuals, a Member of Congress is not free to use every conceivable means to obtain investigatory materials, without fear of criminal prosecution or civil suit.

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[4] The panel's two opinions occupied thirty-two pages in the Federal Reporter.

[5] Even if the two situations were similar, the most that can be said is that the *McSurely* court gave more guidance to the lower court than the court of appeals did here. *Certiorari* will not be granted even in the face of a clear conflict where the issue presented is, as here, a "minor or technical" problem of Appellate supervision. See Stern & Gressman, Supreme Court Practice 270 (5th Ed. 1978).

The [Supreme] Court has taken 'a decidedly jaundiced view towards extending the Clause so as to privilege *illegal* or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.'" *McSurely*, *supra*, 553 F. 2d at 1277, quoting *Gravel* v. *United States*, *supra*, 408 U.S. at 620. (Emphasis added). Like the court of appeals here, the *McSurely* court remanded for further proceedings to determine whether such conduct had occurred. 553 F. 2d at 1299. That petitioners find it necessary to rely upon a supposed conflict with *McSurely* demonstrates that *certiorari* is not warranted here.[6]

Nor is there conflict between this case and *United States* v. *Helstoski*, 635 F.2d 200 (3rd Cir. 1980), as petitioners claim. (Pet. 14). In *Helstoski*, the court of appeals dismissed the remaining counts of an indictment charging a Congressman with bribery and perjury because the Government had presented to the Grand Jury "'testimony concerning Helstoski's motivations for the introduction of private immigration bills, the procedures by which such bills were presented in the House of Representatives, his office procedures for handling such requests, as well as correspondence and files concerning these bills and copies of the bills themselves'" 635 F.2d at 202. Such evidence ". . . permeated the whole proceeding." *Id.* at 205.

Here, by contrast, respondent has presented no evidence of legislative acts and petitioners have failed to carry their summary judgment burden of showing that their conduct prior to the November 3rd meeting preceded their association with ABC in the unlawful and unprotected taping and broadcast. If they do, there will be ample opportunity for the district court to consider their

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[6] The court of appeals did not expressly rely on the illegality exception to the Speech or Debate Clause. See Pet. 3a-4a.

claim of privilege again, as the court of appeals authorized it to do, (Pet. 3a) and to take such steps as may be required to respect the privilege. Since petitioners have failed *factually* to show that untainted legislative acts are at issue here, let alone that evidence of them "permeate[s] the whole proceeding", *Helstoski, supra*, they have shown no conflict.

C. The Court Below Did Not Decide A Novel Or Important Question of Federal Law

The court of appeals did not decide whether the Speech or Debate Clause ". . . protect[s] . . . *valid* investigative activity through 'field work' by staff . . ." as petitioners assume in arguing that this case is certworthy. (Pet. 19; See *id*, 10-11) (emphasis added). Rather, the court below decided that a public broadcast is not a legislative act (Pet. 3a) and that ". . . at this point in the proceedings" (Pet. 3a) petitioners had not shown whether they were engaging in a legislative investigation or in an unprotected effort to televise a distorted picture of respondent's sales methods when they infiltrated respondent's business and staged the meeting in suit. Hence, the record does not present and the court below did not decide whether legislative aides are absolutely protected from civil liability for "acts performed as part of 'field work'" (Question 2), or whether, had petitioners been engaged in legislative acts, taping and broadcasting *by a third party* would have deprived Congressional participants in those acts of absolute immunity. (Question 1).

Similarly, the record does not present the question whether the illegality that may strip legislative acts of Speech or Debate Clause protection may be based on the "mere" allegation of a complaint. (Question 3). For, again, petitioners have not shown whether they were engaging in "legislative acts" or in unprotected publicizing of their field investigation when they engaged in the conduct in suit. Since petitioners sought summary dis-

missal without making that showing, the question whether such illegality need only be alleged, or whether it must be proved by evidence, is not presented here.

In addition, the evidence bearing upon illegality was entirely in defendant's hands, and petitioners successfully prevented respondent from engaging in discovery prior to the decisions below. Petitioners presented no facts bearing on that issue. Hence the question arises, if at all, in a unique, hypothetical context, shorn of the illumination that a proper factual setting would afford. Resolution of the question sought to be presented should await a more suitable vehicle. See *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960); *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968); *Minnick* v. *California Dept. of Corrections*, —— U.S. ——, 101 S. Ct. 2211, 2223 (1981) (Brennan, J., concurring); Stern & Gressman, Supreme Court Practice 370-371 (5th Ed. 1978).

Nor, if the questions were presented, would they be important. This Court has indicated that field investigations are within the scope of the Speech or Debate Clause. See *Gravel* v. *United States*, 408 U.S. 606, 629 (1972); *Dombrowski* v. *Eastland*, 387 U.S. 82, 84 (1967), *explained*, *Gravel* v. *United States*, 408 U.S. 606, 619-620 (1972). No court of appeals (including the court below) has held otherwise. Compare *McSurely*, *supra*, 553 F.2d at 1286-1287. And our research has uncovered not one lower court opinion analyzing the policy and legal considerations that bear upon the questions sought to be presented. In that state of the law, *certiorari* appears highly inappropriate.

In addition, the problem arises infrequently. Petitioners have cited only one other lower court decision applying the Speech or Debate Clause to field investigations, and our research has uncovered only one other.[7]

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[7] *Dombrowski* v. *Burbank*, 358 F.2d 821 (1966) *reversed in relevant part*, 387 U.S. 82 (1967).

Apparently, Congressional staff members infrequently are charged with violating the criminal and civil laws in conducting field investigations, presumably because they rarely do. Given the number and clarity of this Court's recent decisions in the Speech or Debate Clause field and the paucity of litigation bearing upon the questions sought to be presented, they are unimportant.

In any event, this case presents no issue of principle. Rather, the question presented is whether the district court and the court of appeals correctly read the record and applied familiar law governing motions for summary judgment. This Court does not sit to deal with such trivia. Especially in light of the court of appeals' invitation to renew petitioner's motion upon presentation of a proper factual showing, *certiorari* should be denied.[8]

CONCLUSION

For the reasons set forth above, respondent respectfully requests that the petition for *certiorari* be denied.

Respectfully submitted,

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[8] The decision below is interlocutory. That, too, argues against *certiorari*. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

APPENDIX

APPENDIX

Sections 10-401 and 10-402 of the Maryland Wiretapping and Electronic Surveillance Act, Md. Cts. & Jud. Proc. Code Ann. §§ 10-401 and 10-402 provide in part:

§ 10-401. Definitions.

As used in this subtitle, the following terms have the meanings indicated:

* * * *

(2) "*Oral communication*" means any conversation or words spoken to or by any person in private conversation;

(3) "*Intercept*" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

* * * *

(5) "*Person*" means any employee or agent of this State or a political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

* * * *

§ 10-402. Interception of communications generally.

(a) *Unlawful acts.*—Except as otherwise specifically provided in this subtitle it is unlawful for any person to:

(1) Wilfully intercept, endeavor to intercept, or procure any other intercept or endeavor to intercept, any wire or oral communication;

(2) Wilfully disclose, or endeavor to disclose, to any other person of any wire or oral communication, knowing or having reason to know information was obtained through the interception of a wire communication in violation of this subtitle; or

(3) Wilfully use, or endeavor to use, the contents of any wire communication, knowing or having reason to know that the information obtained through the interception of a wire or oral communication of this subtitle.

(b) *Penalty.*—Any person who violates subsection (a) of this section of a felony and is subject to imprisonment for not more than five years of not more than $10,000 or both.

* * * *

(c) *Lawful acts.*—(3) It is lawful under this subtitle for a person to intercept a wire or oral communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

Sections 2510 and 2511 of Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510 and 2511 provide in part:

§ 2510. Definitions

As used in this chapter—

* * * *

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

* * * *

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

(2) (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N79-2386

GEORGE H. BENFORD,
Plaintiff

v.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Defendants

ORDER

Upon consideration of Congressional Defendants' Motion For Stay of Further Proceedings and upon hearing in open court on March 10, 1981, it is this 11th day of March, 1981, ORDERED that the Motion For Stay of Further Proceedings in this action by Defendants Holton, Gardner, Teitelbaum, and Hamburger, by their attorneys, BE and the same hereby IS granted to the extent that no trial shall be had of the case until such time as the issues raised by said defendants, presently pending on appeal to the Fourth Circuit Court of Appeals, are finally resolved.

It is FURTHER ORDERED that said Motion for Stay of Further Proceedings is denied insofar as it seeks to preclude discovery by the Plaintiff of Defendants Osmer and American Broadcasting Companies, Inc. by way of Interrogatories and Requests for Production of Documents.

/s/ Edward S. Northrop
EDWARD S. NORTHROP
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1200

[Filed April 1, 1981]

GEORGE H. BENFORD,
Plaintiff,

versus

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

The matter now before the court arises from an action originally commenced in state court and then removed to the United States District Court for the District of Maryland in which plaintiff Benford alleged a number of claims under state and federal statutes, the United States Constitution and state tort law against American Broadcasting Companies, Inc. (ABC), Margaret Osmer, an ABC employee (collectively ABC defendants) and several individual members of an investigatory team of the Select Committee on Aging, U.S. House of Representatives (congressional defendants). In general terms the claimed violations of right all arose from the Select Committee's investigation of the sale of supplemental health insurance policies to the elderly, and specifically from the allegedly concerted conduct of the ABC and congressional defendants in investigating and reporting the activities of Benford, an insurance agent, in the attempted sale of such insurance.

When the district court denied the congressional defendants' alternative motions to dismiss and for summary judgment based upon claims of Speech and Debate Clause or general legislative immunity, those defendants gave notice of appeal from that order to this court. In conjunction with noting appeal, they moved in the district court for a stay pending the appeal of all further proceedings in that court. By order of March 11, 1981, the district court granted the stay motion to the limited "extent that no trial shall be had" pending the appeal but expressly denied it to the extent it sought to preclude "discovery by the Plaintiff of [the ABC defendants] by way of Interrogatories and Requests For Production of Documents" pending the appeal. The congressional defendants then moved in this court "pursuant to Fed. R. App. P. 8(d)" (*sic*) for "a stay of further proceedings in the District Court pending resolution of [their] appeal." Expedited consideration was requested.

While the latter motion was pending before a two-judge motion panel of this court, the plaintiff filed in this court (and contemporaneously in the district court) a motion "for an Order directing all defendants in this case to protect and preserve all documents in their possession, custody or control relating to . . . the matters in controversy pending resolution of Congressional defendants' appeal. . . ." This motion has been referred to the same motion panel considering the congressional defendants' motion to stay.

Responses to both motions have been filed, and we have before us in addition the parties' briefs and portions of the district court record submitted in conjunction with the motion and responses. We consider the motions in the order filed and above described.

I

We DENY the congressional defendants' application for a stay of all proceedings in the district court pending

disposition of their appeal, and direct that further proceedings may be had as provided in the district court's order of March 11, 1981 granting in part and denying in part the congressional defendants' motion in that court for a stay of all proceedings.

While we consider the motion for stay made to this court not as an appeal from the district court's order but as an invocation of our original jurisdiction to grant relief under the All Writs Statute, 28 U.S.C. § 1651, *see* 9 Moore's Federal Practice, ¶ 208.01[2], we consider it appropriate in addressing it to take into account the district court proceedings on the stay motion in that court, including the apparent basis for the district court's grant of a limited stay order as revealed in the transcript of those proceedings. In that setting the district court was properly exercising its discretion under an inherent power to control further proceedings in the trial court during the pendency of an appeal from a judgment which does not finally dispose of all claims before it. *See* 15 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 3911 at 497-98.

In exercising our supervisory powers under the All Writs Statute we must take into account the same factors that demonstrably were weighed by the district court. There, as here, the congressional defendants urged that the Speech and Debate Clause immunity protects them not only from liability "but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). That protection, they contend, must be given them while the question of their immunity remains in dispute on appeal, lest it be irretrievably lost to them were they ultimately to prevail on the merits of that defense. To allow even the limited discovery provided by the district court order—confined though it be to document discovery and interrogatories directed to the ABC defendants only—does not, they say, provide

that protection. If it proceeds, they must defend themselves against the possibility of various adverse spin-off effects from the discovery that are possible notwithstanding it is so limited. We have considered those possibilities, as did the district court. While they cannot be dismissed as wholly speculative, we conclude, as did the district court, that they are too peripheral to the interest protected by the immunity asserted to outweigh the conflicting interests in expeditious conduct of the litigation that are the proper concerns both of the district court and this court.

II

We decline to consider the plaintiffs' motion for a protective order, on the basis that we lack jurisdiction to consider it. Assuming the appeal of the congressional defendants is validly before us, it did not totally deprive the district court of jurisdiction over the litigation. *See, generally*, 15 C. Wright & A. Miller, *supra*, § 3911 at 497-98. Indeed, the relief requested in the plaintiff's motion would seem to lie directly within the scope of those proceedings over which, by its limited stay order, the district court has correctly exercised a retained jurisdiction. The same motion is pending before the district court and should be considered by that court in the first instance. Our jurisdiction with respect to it may only be invoked by an appeal from a resulting order.

III

In view of the issues presented and the procedural context of the case, we are directing that the pending appeal be expedited for hearing at the earliest practicable time. In that connection, we observe that, though there has been no formal motion to dismiss the appeal as premature, the parties have briefed the issue of appealability in the course of advancing and resisting the motion to stay all proceedings. We have not addressed

that question because, though closely related, *see McSurely* v. *McClellan*, 521 F.2d 1024, 1030-33 (D.C. Cir. 1975), it is not squarely presented by the motions before us. Of course it may be considered in conjunction with the appeal, either on motion or *sua sponte*.

The clerk will arrange a briefing schedule for expedited consideration of the appeal and of any related motions.

With the concurrence of Judge Murnaghan, it is SO ORDERED.

/s/ [Illegible]
United States Circuit Judge

Amicus Brief

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-452

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

MOTION OF THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER, THE HONORABLE JIM WRIGHT, MAJORITY LEADER, AND THE HONORABLE ROBERT H. MICHEL, REPUBLICAN LEADER, UNITED STATES HOUSE OF REPRESENTATIVES, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LEONARD KIRK O'DONNELL,
General Counsel to the Speaker,
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Attorney For Amici Curiae

The Speaker of the House of Representatives, pursuant to the authority vested in him by the Constitution and the rules of the House, together with the Majority and Republican Leaders, hereby respectfully move for leave to file the accompanying brief *amicus curiae* urging that the Court grant certiorari in this case of paramount importance to the legislative branch.[1] For purposes of this motion and brief, *amici* adopted the questions presented and statement of the case of the petitioners. As demonstrated in the accompanying brief *amici curiae* the issues raised by this litigation are of utmost importance to the continued vitality of an independent legislature. Accordingly, the Speaker of the United States House of Representatives and the elected party leaders of the House, as *amici,* urge that leave be granted to file the accompanying brief *amici curiae* and respectfully so moves this Court.

Respectfully submitted.

LEONARD KIRK O'DONNELL,
General Counsel to the Speaker.
Attorney For Amici

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[1] Counsel for Respondent declined to consent to the filing of this brief *amici curiae.*

No. 81-452

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

BRIEF OF THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER, THE HONORABLE JIM WRIGHT, MAJORITY LEADER, AND THE HONORABLE ROBERT H. MICHEL, REPUBLICAN LEADER, UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Speaker of the House of Representatives, pursuant to the authority vested in him by the Constitution and the rules of the House, together with the Majority and Republican Leaders, appear here as *amici curiae*, with the consent of the parties,[1] urging that the Court grant certiorari in this case of paramount importance to the legislative branch. For purposes of this brief, *amici* adopt the questions presented and statement of the case of the petitioners.

INTEREST OF THE AMICI CURIAE

The questions presented by the petitioners in this case are ones affecting virtually every committee and subcommittee in the House of Representatives which, from time to time, conducts investigations into matters within their jurisdiction. The questions also have vital and indeed lasting impact upon the congressional aides who discharge the constitutional duties delegated to them by various committees and subcommittees to conduct legislative investigations.

The Speaker and elected bipartisan leadership of the House, whose duty it is to preserve and protect the constitutional prerogatives of the body, believe it is essential to the maintainance of a vigorous and effective legislature that committees of the House be able to pursue legislative investigations free from the threat

[1] The letters of consent from respondent and petitioners have been filed with the Clerk.

of civil lawsuits or accountability before the courts based on the performance of the investigative function and appear here to urge review of the court of appeals rulings which if allowed to stand will seriously impair and impede the discharge of Congress' legislative authority.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly affirmed the power of the Congress to conduct investigations in aid of the legislative power vested in Congress under Article I. See, e.g., *McGrain* v. *Daugherty*, 273 U.S. 135, 195 (1927); *Anderson* v. *Dunn*, 6 Wheat. 204 (1821); *Watkins* v. *United States*, 354 U.S. 178 (1957).

The power to investigate in aid of its constitutional functions "is an institution rivalling most legislative institutions in the antiquity of its origin." Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926). As early as 1792, the House appointed a committee to investigate the defeat of General St. Clair and his army by Indians in the Northwest. 3 *Annals of Cong.* 409–494 (Gales & Seaton ed. 1792).

The information gathering function, whether by subpoena, or other means, has been declared by the Court to be protected by the Speech or Debate Clause for a sound and indisputable reason.

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

McGrain v. *Daugherty*, 273 U.S. 135, 174–175 (1927).

And when the Congress turns to others who possess relevant information, it is protected from either liability or the burden of defending itself in Court in seeking to obtain that information. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507–511 (1975). *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967).

The Court has also recognized the practical considerations which govern the decision by Congress to employ compulsory process, and which argue in favor of review in this case concerning investigative techniques. "Experience has taught that mere requests for . . . information often are unavailing and also that information which is volunteered is not always accurate or complete." *McGrain, supra* at 175.

Those fundamental and unwavering propositions are under attack from two sources in this case: a private litigant and two lower federal courts, and failure to review this case will result in their acceptance in future cases with dramatic adverse affect on the congressional investigative process.

In recognition of the need for "accurate and complete" information the Select Committee, in pursuance of its inquiry into abusive practices in the sale of supplementary health insurance, employed techniques, described in both the petition for certiorari and the official committee reports and hearings produced and lodged by petitioners with the Clerk, designed to approximate the "real life" conditions encountered by the elderly in purchasing supplemental health insurance.

As a noted commentator on congressional investigations has put it:

> . . . it would seem to be indispensable to wise and considered legislation that the *lawmakers be thoroughly informed as to* the *factual background of the problems to which proposed statutes are directed*, and as to the possible repercussions which new substantive or procedural precepts may have upon the affairs of men.

Van Alstyne, *Congressional Investigations* 15 F.R.D. 471, 473 (1954)(emphasis added). That commentator, with remarkable prescience and of particular relevance here, went on to describe the reasons compelling more thorough and comprehensive legislative inquiries of the kind conducted by the Select Committee.

> The need for information is intensified today, as compared with former generations, by the tremendous complexity of modern civilization, and by the unprecedented development of the power of the Federal government resulting from the revolution in the Constitutional theory which we have witnessed during the past two decades.

Id.

This expansion of the Federal commerce power, the commentator concludes, "serve to illustrate the need for more, rather than less, frequent and *penetrating factual studies* as a prerequisite to intelligent legislation." *Id.*, at 474 (emphasis added).

Here, the Select Committee used a method it used on 50 prior occasions to develop the kind of "penetrating factual studies" which must form the basis of legislation.[2]

---

[2] Although the Speech or Debate Clause protects investigative activity regardless of "what it produces" or whether there is "no predictable end result" *Eastland*, *supra* at 509, remedial legislation was introduced by Chairman Pepper to curtail abusive sales practices uncovered during the investigation. Senior Citizens

This Court has steadfastly refused to permit any encroachments on the Clause, by civil litigants, the executive branch or the federal courts, and has deemed that once it applies, its protection is "absolute". *Eastland, supra* at 509, 510n. 16.

For over two years since commencement of this suit, considerable energy and resources have been devoted to defense of the action, with concomitant demands on the committee staff who are defendants, as well as distraction from the conduct of their official duties. Both the litigants and the federal courts reviewing the case have conceded that the challenged actions arose during a valid and duly authorized investigation "on which legislation could be had", and yet the lower federal courts have refused to apply the clear dictates of this Court that preclude charging legislative acts in a civil complaint, or its criminal analogue, an indictment.

Aside from the reasons adequately set forth in the petition involving the factors for exercise of the Court's jurisdiction under Rule 17, the Court needs to reaffirm that the Congressional investigative function is entitled to Speech or Debate Clause protection, whether it be by subpoena, committee hearings, or the type of field investigation conducted by the Select Committee, which due to the complexities of modern life, are required to ascertain the "complete and accurate" facts which Congress

Health Insurance Reform Act of 1979, H.R. 2602, 96th Cong., 1st Sess., 125 Cong. Rec. H 1068 (daily ed. March 5, 1979). Some of the key elements of the bill were later adopted by the Senate as part of the Social Security Disability Amendments of 1980, 126 Cong. Rec. S 633–642 (daily ed. Jan. 30, 1980), which ultimately became law. Pub. L. No. 96–265, 94 Stat. 441 (June 9, 1980).

requires as a predicate to "wise" legislation. Moreover, in an age when Congress is called upon with increasing frequency to defend itself in court, the Court should take the opportunity presented by this case to make clear to the lower federal courts that "field work" is an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to legislation, *Gravel* v. *United States*, 408 U.S. 606, 625 (1972) and that failure to remedy the inconsistencies and misapplications of the lower federal courts is "necessary to prevent indirect impairment of such deliberations" *id.*, in this case and more importantly, in the future.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and resolve the questions presented which are of such vital concern to the legislative branch.

Respectfully submitted.

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Attorney for Amici.

OCTOBER 22, 1981.

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